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NOTE SUR LES DEVELOPPEMENTS EN DROIT INTERNE ET DROIT INTERNATIONAL PRIVE SUR LA COHABITATION HORS MARIAGE, Y COMPRIS LES PARTENARIATS ENREGISTRES

établie par Caroline Harnois (ancienne Collaboratrice juridique)
et Juliane Hirsch (Collaboratrice juridique)

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NOTE ON DEVELOPMENTS IN INTERNAL LAW AND PRIVATE INTERNATIONAL LAW CONCERNING COHABITATION OUTSIDE MARRIAGE, INCLUDING REGISTERED PARTNERSHIPS

drawn up by Caroline Harnois (former Legal Officer)
and Juliane Hirsch (Legal Officer)

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INTRODUCTION

A – Background for this Note - Updating of documents issued by HCCH

1. The Nineteenth Session, on the basis of the proceedings of Commission I at its meetings on 21 and 22 June 2001 and 22 to 24 April 2002, decided to maintain the subject of jurisdiction, applicable law, and recognition and enforcement of judgments relating to unmarried couples on the future work programme agenda of the Conference, among the non-priority matters.[1] This decision was confirmed by the subsequent meetings of the Hague Conference on General Affairs and Policy.[2]

2. Since 1987, the Permanent Bureau has presented three Notes[3] on the jurisdiction, applicable law and recognition and enforcement of judgments relating to unmarried couples. An update is called for in the light of the quantity and importance of the legislative and judicial activity in this area in recent years encompassing both developments in relation to domestic laws of different States and international law, for example, the activities of the International Commission on Civil Status and of the European Union.

3. The subject dealt with is complex having regard, *inter alia*, to the diversity of forms of unmarried cohabitation, the names given to it, and above all its effects. Accordingly cohabitation out of wedlock raises several issues which can have difficult consequences when the persons concerned leave the State where the unmarried cohabitation was formed and become subject to foreign legal systems which do not necessarily recognise their status and fulfil their expectations.

4. The subject is also sensitive and a matter for intense and increasingly frequent debate at the national, regional and international levels. Even though the subject, in some people's view, is associated with unions of persons of the same sex, this is not the only situation to which unmarried cohabitation refers: *de facto* unions are far more common among couples of different sexes. Certain legal systems also introduced a system of registered partnership available for different-sex couples, which may be used by couples who, without wishing to marry, seek to place their relationship on a more formal footing.

5. The birth rate outside wedlock gives some indication of the extent of cohabitation outside marriage, although not precisely measuring, it. The rates vary widely, even within different regions. In Europe, for example, the birth rates outside wedlock vary from 5% to more than 60%.[4]

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[1] See Final Act of the Nineteenth Session, December 2002, pp. 16, 17.

[2] See, for instance, Recommendations and Conclusions of the Council Meeting on General Affairs on 2-4 April 2007, p. 1, para. 2, d).

[3] (1) "Note on the law applicable to unmarried couples", Prel. Doc. No 8 of December 1987, drawn up by the Permanent Bureau, *Proceedings of the Sixteenth Session* (1988), Tome I, Miscellaneous matters, pp. 159 *et seq*. (hereinafter Prel. Doc. No 8 / 1987);
(2) "Note on the law applicable to unmarried couples", Prel. Doc. No 5 of April 1992 for the attention of the Special Commission of June 1992 on General Affairs and Policy of the Conference, drawn up by the Permanent Bureau, *Proceedings of the Seventeenth Session* (1993), Tome I, Miscellaneous matters, pp. 109 *et seq.* (hereinafter Prel. Doc. No 5/1992);
(3) "Private International Law Aspects of Cohabitation outside marriage and registered partnership", Prel. Doc. No 9 of May 2000 for the attention of the Special Commission of May 2000 on General Affairs and Policy of the Conference, drawn up by the Permanent Bureau, *Proceedings of the Nineteenth Session* (2001/2002), Tome I, Miscellaneous matters, pp. 413 *et seq*. (hereinafter Prel. Doc. No 9/2000).

[4] In 2006, the European States with the lowest number of births out of wedlock were Greece, with only 5.28% and Cyprus with 5.6%, whereas Iceland for more than 10 years has had a yearly rate of more than 60% of children born to unmarried parents. In several European States births of children outside wedlock in 2006 exceed 50%, for example, Bulgaria (50.8%), Estonia (58.2%), France (50.5%), Sweden (55.5%) and Norway (53%). In 11 of the 28 European States listed in the 2006 statistics births outside wedlock accounted for 30 to 50% of domestic births (Czech Republic, Denmark, Ireland, Latvia, Hungary, Netherlands, Austria, Portugal, Slovenia, Finland and the United Kingdom), in five countries they accounted for 20 to 30% of domestic births (Germany, Lithuania, Luxemburg, Romania and Slovakia), in five countries they accounted for 10 to 20% of domestic births (Poland, Croatia, Macedonia, Liechtenstein and Switzerland), and in only two countries did they account for less than 10% of domestic births (Cyprus and Greece). See the Eurostat Website at: < http://epp.eurostat.cec.eu.int/ > (website last consulted in March 2008).

6. This trend is not restricted to Europe. In the USA the birth rate outside wedlock accounted for 46.1% of all births in 2004.[5] In 2006 in Canada, out of a total of 8,896,840 families with children, 6,105,910 consisted of married couples.[6] In addition, it is estimated that 9 to 24% of women of the age between 15 to 49 in Uganda, Cameroon, Ghana, Madagascar, Namibia and Rwanda, and more than 55% of women in Mozambique, live in unofficial or consensual unions. This situation is also very common in Latin America, where the rate of unmarried union amounts to 13% in Brazil and 36% in the Dominican Republic.[7]

7. Statistical data is also available for registered partnerships. The figures are higher for jurisdictions which, like France and the Netherlands, have created a system of registered partnerships open both to same-sex couples and to couples of opposite sexes. Thus in France, from November 1999, the time of enactment of the statute creating the "pacte civil de solidarité" (hereinafter Pacs), to the end of March 2001, some 37,000 Pacs were entered into; by the end of 2006 the number of Pacs registered exceeded 260,000.[8] In the Netherlands by 2003, four years after the introduction of registered partnerships, a total number of approximately 13,000 partnerships had been registered.[9] The number of partnerships registered in 2005 was 11,307 and in 2006 it was 10,801.[10]

8. In legal systems which have instituted a form of registered partnership reserved for same-sex couples, the figures are not as large but still remarkable in due proportion. In Norway, 227 partnerships were registered in 2006 and between 1993 and 2006 a total number of approximately 2,000 partnerships were registered.[11] In Finland in 2006, a total number of 948 partnerships were registered (120 with children).[12] In Switzerland, where the federal registered partnership law only exists since January 2007, about 2,000 same-sex partnerships were registered within the first year of operation of that law.[13]

9. The Permanent Bureau's aim in drafting this Note is to provide an update of information, and sum up a growing reality reflected in domestic, regional and international initiatives.

B – Terminology

10. This Note will deal, on the one hand, with unmarried cohabitation, and on the other hand, with registered partnerships.

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[5] See US Census Bureau at < http://www.census.gov/compendia/statab/tables/08s0084.pdf > (website last consulted in March 2008).
[6] See Canadian Statistics at < http://www40.statcan.ca/l01/cst01/famil54a.htm > (website last consulted in March 2008).
[7] See Statistics compiled in the 2002 fact sheet "Families worldwide" published by *Action Canada for Population and Development* (ACPD).
[8] See Xavier Labbée, "*Pacs : derniers textes*", Actualité Juridique Famille 2007, pp. 8 *et seq.*, at p. 10.
[9] See Katharina Boele-Woelki / Wendy Schrama, "Die nichteheliche Lebensgemeinschaft im niederländischen Recht", in Jens M. Scherpe / Nadjma Yassari, *Die Rechtsstellung nichtehelicher Lebensgemeinschaften – The Legal Status of Cohabitants*, Mohr Siebeck, Tübingen 2005, p. 312.
[10] See Statistics of the Central Statistics Bureau of the Netherlands, at < http://statline.cbs.nl > (website last consulted in March 2008). It should be noted that approximately half of the partnerships registered in the Netherlands in 2005 and 2006 were marriages transformed into partnerships. Such a transformation is often used to have access to less demanding requirements for a dissolution of the relationships, see below Part II, C, 1, a).
[11] See Statistics Norway at < www.ssb.no/ekteskap_en > (website last consulted in March 2008).
[12] See Statistics Finland-Finland in Figures-Population, at: < www.stat.fi/tup/suoluk/suoluk_vaesto_en.html > (website last consulted in March 2008).
[13] See Swiss Federal Authority for Statistics at: www.bfs.admin.ch/bfs/portal/en/index/themen/01/02/blank/key/natuerliche_bevoelkerungsbewegung/01.htm> (website last consulted in March 2008).

11. Few jurisdictions expressly define unmarried cohabitation or equivalent terms like *de facto* union. Hungary is an example of a jurisdiction which gives an express statutory definition of unmarried cohabitation.[14] Jurisdictions that attribute legal effects to unmarried cohabitation, however, often define unmarried cohabitation indirectly by requesting the fulfilment of certain conditions before granting the relevant rights. For the purpose of this Note the term unmarried cohabitation should be understood as concubinage or a *de facto* unregistered union formed, subject to certain conditions, by the parties' actual cohabitation.

12. Registered partnership as used in this Note refers to a form of cohabitation outside marriage which, in order to be valid, requires the fulfilment of certain formalities, especially the registration in a central registry. It is acknowledged that the term "registered partnership"[15] is not the only one that might be used to describe the legal concept as defined above. National legislations use different terms, such as partnership,[16] domestic partnership,[17] civil partnership,[18] civil union,[19] permanent couple union,[20]
union of permanent couples,[21] statutory cohabitation,[22] civil pact of solidarity

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[14] § 685/A of the Civil Code of Hungary states: "*Cohabitants are – unless otherwise defined by law – two persons living together, without having entered into marriage, in a common household, in an emotional association and in an economic partnership*" (unofficial translation). Another example is New Zealand where the term *de facto* relationship is defined in Section 2D of the *Property Relationship Act of 1976* (hereinafter New Zealand Property (Relationships) Act).

[15] The term of registered partnership is used, for instance, in Denmark, Finland, Norway, the Netherlands, Sweden and Switzerland. See, for Denmark: *Lov om registreret partnerskab (Lov nr. 372, af 07.06.1998)*, as amended by the following laws: *Lov. nr. 821 af 19.12.1989,* § 36 *Lov nr. 387 af 14.06.1995, Lov nr. 360 af 02.06.1999,* § 6 *Lov nr. 446 af 09.06.2004* and § 4 *Lov nr. 525 af 24.06.2005* (hereinafter Danish Registered Partnership Law); for Finland: *Laki rekisteröideystä parisuhteesta (No 950/2001)* amended by *Laki rekisteröideystä parisuhteesta annetun lain 13 ja 14 §:n muuttamisesta (No 1229/2001)* and *Laki rekisteröideystä parisuhteesta annetun lain muuttamisesta (59/2005)* (hereinafter Finnish Registered Partnership Law); for Norway: *Lov om registrert partnerskap nr 40 af 30.04.1993* as amended by *Lov nr. 104 af 21.12.2000* and *Lov nr. 36 af 15.06.2001* (hereinafter Norwegian Registered Partnership Law); for the Netherlands: Book 1, Arts 80a *et seq.* of the *Burgerlijk Wetboek* (hereinafter Dutch Civil Code), introduced by the Law of 05.07.1997, Staatsblad No 324; for Sweden: *Lag (1994 :1117)* amended by *Ändring (1995 :1245*), *Ändring* (2000 :374) and *Ändring (2002 :603)* (hereinafter Swedish Registered Partnership Law); for Switzerland: *Loi fédérale du 18 juin 2004 sur le partenariat enregistré entre personnes du même sexe* (in force since 1 January 2007) (hereinafter Swiss Registered Partnership Law).

[16] Used in Luxemburg, see *Loi du 9 juillet 2004 relative aux effets légaux de certains partenariats*, Memorial Journal Officiel du Grand-Duché de Luxembourg, A - No 143, 06.08.2004 (hereinafter Luxemburg Registered Partnership Law).

[17] The term is used, for instance, in California (USA), see Sections 297-299.6 Family Code of California and Nova Scotia (Canada), see *Vital Statistics Act, R.S.N.S. 1989* as last amended in 2006 (hereinafter Vital Statistics Act of Nova Scotia (Canada)).

[18] For instance, in the United Kingdom, see *Civil Partnership Act 2004* (hereinafter UK Civil Partnership Act).

[19] The term is used, for instance, in the Autonomous City of Buenos Aires (Argentina), see *Ley de Unión Civil de la Ciudad Autonoma de Buenos Aires No 1004/2.002 y Decreto Reglamentario No 556/2.003, published in BOCBA No 1617*, 27 January 2003 (hereinafter Civil Union Law of the Autonomous City of Buenos Aires (Argentina)); in Quebec (Canada): *Act instituting civil unions and establishing new rules of, 2002*, (hereinafter Civil Union Act of Quebec); in New Zealand: *Civil Union Act 2004*, (hereinafter Civil Union Act of New Zealand); in Connecticut (USA) *An Act Concerning Civil Union, Public Act No 05-10, Substitute Senate Bill No 963* (hereinafter Civil Union Act of Connecticut (USA)) and in Vermont (USA) *Act relating to Civil Unions* amending 15 V.S.A. Chapter 23 (hereinafter Civil Union Act of Vermont (USA)).

[20] Used in Andorra, see *Llei 4/2005, del 21 de febrer, qualificada de las unions estables de parella, Butlletí Oficial del Principat d'Andorry No 25, any 17,* pp. 1022-1025 (hereinafter Registered Partnership Law of Andorra).

[21] Balearic Islands (Spain) *Ley 18/2001 de 19 de diciembre de 2001 de parejas estables* (hereinafter Partnership Law of the Balearic Islands (Spain)).

[22] Belgium, see §§ 1475-1479 of the 3rd Book of the Belgian Civil Code as introduced by the *Loi instaurant la cohabitation légale, 23 November 1998* (hereinafter Statutory Cohabitation Law of Belgium); see also Ian Curry-Sumner, *All's well that ends registered? The Substantive and Private International Law Aspects of Non-Marital Registered Relationships in Europe* - A comparison of the laws of Belgium, France, The Netherlands, Switzerland, and the United Kingdom, Intersentia, Antwerp-Oxford, 2005, pp. 38 *et seq*.

(Pacs),[23] etc.[24] In this Note the term registered partnership is used in a wide meaning, covering all forms of cohabitation outside marriage, that in order to be valid, need to be registered. It has, however, to be emphasised that the exact conditions and effects of the institution differ from country to country.[25]

13. The term "registered partnership" to denote a formalised union which is not a marriage has been selected for the purpose of this Note to ensure clarity and consistency and owing to the public recognition of this term, used since the late 1980s. However, if further initiatives at the international level were contemplated, the term could be reconsidered. Terms like formalised union[26] or registered non-marital relationship[27] might perhaps be found more suitable or precise.

14. It should be emphasised that the definitions chosen for the purpose of this Note are simply working definitions. In addition, classifying certain relationships in national legislation as either "unmarried cohabitation" or "registered partnership" is not without its difficulties. Due to the various models of partnership outside marriage it is often difficult to assign them clearly to one of the two categories (see also below under Part I, C, 3).

15. Even the distinction between a registered partnership and marriage raises problems. In South Africa,[28] for example, the parties to a civil union (different-sex or same-sex) may choose whether to call the union a marriage or civil partnership. Whatever is chosen the requirements and the effects are the same. In some other systems also the rules attaching to registered partnerships may be almost identical to those for marriage. In this Note the term "marriage" is used according to the actual usage in the particular legal system.

C – Structure

16. This Note will review recent internal developments with respect to unmarried cohabitation (Part I) and registered partnerships (Part II). It will then provide a summary review of recent developments with respect to same-sex marriage (Part III) and end with a description of the issues of private international law relating to unmarried cohabitation (Part IV) and registered partnership (Part V), followed by example cases by way of conclusion (Part VI).

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[23] France; Pacs stands for "Pacte civil de solidarité", see *Loi No 99-944 du 15 novembre 1999 relative au pacte civil de solidarité* as amended by *Loi No 2006-728 du 23 juin 2006* (in force since 1 January 2007) (hereinafter Pacs Law of France).

[24] In Germany the registered partnership is called "Lebenspartnerschaft", which can best be translated as life partnership; see *Gesetz über die eingetragene Lebenspartnerschaft vom 16.02.2001* as introduced by *Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften,* BGBl I 2001, 266, as amended by *Gesetz zur Überarbeitung des Lebenspartnerschaftsrechts vom 15.12.2004*, BGBl I 2004, 3396 and as amended by *Gesetz zur Änderung des Ehe- und Lebenspartnerschaftsnamensrechts vom 06.02.2005* (BGBl I 2005, 203). The German *Gesetz über die eingetragene Lebenspartnerschaft* in its current version is hereinafter cited as German Registered Partnership Law.

[25] See below Part II, D.

[26] See Text proposal of the European Group for Private International Law, Fourteenth meeting, Tenerife, 17-19 September 2004, see < www.gedip-egpil.eu/reunionstravail/gedip-reunions-14t-fr.html > (website last consulted in March 2008).

[27] See Ian Curry-Sumner, *All's well that ends registered?*, see *supra* footnote 22, at p. 11.

[28] See Sections 2, 11, 12 and 13 of the South African *Civil Union Act, 2006 (Act No 17/2006)*, published in Government Gazette, 2006, Vol. 497, No 29441 (hereinafter South African Civil Union Act).

PART I – RECENT DEVELOPMENTS WITH RESPECT TO UNMARRIED COHABITATION (*DE FACTO* UNION) IN INTERNAL LAW

A – Preliminary observations

17. The purpose of this part of the Note is to sum up recent developments that have occurred since the publication of Preliminary Document No 5/1992.[29] As most of the information contained in that document remains relevant, we shall only discuss recent developments or changes.

18. Among the several jurisdictions that have in the recent years enacted new legislation on unmarried cohabitation are, for instance, Brazil,[30] Croatia,[31] Portugal,[32] Sweden,[33] Tasmania (Australia)[34] and Uruguay,[35] as well as several Spanish autonomous communities[36].

B – Definition of unmarried cohabitation / *de facto* union

19. Unmarried cohabitation as used in this Note should be understood as referring to concubinage or *de facto* unregistered unions formed, subject to certain conditions, by the parties' actual cohabitation.[37]

20. As mentioned above, in many legal systems the term unmarried cohabitation is not defined. As a general principle one can state that legal systems that attribute legal consequences to unmarried cohabitation are more likely to establish a definition of the term or elaborate general conditions to distinguish unmarried cohabitation from other relationships.

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[29] See *supra* footnote No 3.

[30] Provisions on unmarried cohabitation have been introduced into the Brazilian *Código Civil, Lei No 10.406, 10.01.2002* (hereinafter Civil Code of Brazil), see Arts 1723-1727 Civil Code of Brazil.

[31] For different sex cohabitation see *Croatian Family Law, law of 14.07.2003* (hereinafter Croatian Family Law); for same sex cohabitation see *Croatian Law on same sex partnership, law of 14.07.2003* (hereinafter Croatian Cohabitation Law).

[32] See *Lei 7/2001 de 11.05.2001 Adopta medidas de protecção das uniões de facto* (hereinafter Law of Portugal on *de facto* unions).

[33] See *Sambolag (2003:376)* last amended by *Lag (2005:454)* (in its amended version hereinafter Swedish Cohabitation Act).

[34] See Tasmanian *Relationship Act 2003, 17.09.2003,* (hereinafter Relationship Act of Tasmania (Australia)).

[35] Uruguay is one of the most recent examples for a jurisdiction opening the possibility of a legally recognised unmarried cohabitation to same-sex couples. The law, *Unión Concubinaria, Ley No 18.246* (hereinafter Concubinage Union Law of Uruguay) was enacted in December 2007.

[36] Thirteen of the 17 Comunidades Autónomas (regions with certain legislative and administrative competences; hereinafter Spanish autonomous communities) have enacted specific laws on cohabitation outside marriage. In the majority of these laws the formal act of registration is conceived as constituting element. They are therefore dealt with under the heading registered partnership, in Part II. Laws on unmarried cohabitation, as defined in this Note, are in force in the autonomous communities of Andalusia, Asturias, Aragón, Catalonia, Canary Islands and Navarra. See for Andalusia *Ley 5/2002, de 16 de diciembre, de parejas de hecho de Andalucía, BO de la Junta de Andalucía de 28.12.2002, núm. 153* and *BOE 13.01.2003, núm. 11* (hereinafter Law on *de facto* unions of Andalusia (Spain)); see for Asturia *Ley 4/2002, de 23.05.2002, de Parejas estables de Asturias*, *BO del Principado de Asturias, de 31.05.2002, núm. 125* and *BOE 02.07.2002, núm. 157* (hereinafter Partnership Law of Asturias (Spain)); see for Aragón *Ley 6/1999, de 26.03.1999, de Parejas estables no casadas de Aragón, BO de Aragón de 06.04.1999, núm. 39* and *BOE 21.04.1999, núm. 95* (hereinafter Partnership law of Aragon (Spain)); see for Catalonia *Ley 12/1998, de 15.07.1998, de Uniones estables de pareja de Cataluña, DO de la Generalitat de Catalunya de 23.07.1998, núm. 2687* and *BOE de 19.08.1998, núm. 198* (hereinafter Partnership Law of Catalonia (Spain)); see for the Canary Islands *Ley 5/2003, de 6.03.2003, para la regulación de las parejas de hecho en la Comunidad Autónoma de Canarias, BOE 14.04.2003, núm. 89* (hereinafter Partnership Law of the Canary Islands (Spain)); see for Navarra *Ley 6/2000, de 19.06.2000, para la igualdad jurídica de las parejas estables de Navarra, BO de Navarra de 7.07.2000, núm. 82* and *BOE 06.09.2000, núm. 214* (hereinafter Partnership Law of Navarra (Spain)).

[37] See terminology above.

C – Formation of the union

1. Conditions or *indicia*

21. As stressed in the 1992 Note,[38] what separates cohabitation from marriage, and from a registered partnership, is the general absence of formalities surrounding the cohabitation. What they have in common is the persons' wish to cohabit.

22. The conditions for formation of the cohabitation or the *indicia* of its existence vary, not only between States but also frequently from one law to another within States consisting of different jurisdictions. Even though unmarried cohabitation is rarely defined precisely, certain characteristics are common to cohabitation as it is known in the various States.

a) Duration

23. An essential requirement for unmarried cohabitation is some duration in the relationship, which varies from one legal system to another but is long enough to distinguish it from a mere relationship. Certain legal systems specify this minimum duration while others merely provide that the cohabitation must be of long duration. Thus, some legal systems require a minimum duration of one year's cohabitation, such as Asturien (Spain),[39] two years' cohabitation, such as Peru,[40] Portugal,[41] Aragon (Spain)[42] and Catalonia (Spain),[43] or three years uninterrupted, such as Croatia,[44] Guatemala,[45] and El Salvador,[46] or even five years uninterrupted, such as Panama[47] and the State of Jalisco (Mexico)[48].

24. The requirement of duration is sometimes replaced, or diminished, by the presence of a child of both cohabitants. For instance, in the State of Jalisco (Mexico), the minimum period of five years is reduced to three if the cohabitants have a child together.[49]

25. Other legal systems do not specify the minimum duration required for formation of the cohabitation or *de facto* union, but specify that the cohabitation must be permanent, uninterrupted and durable. France, for instance, describes concubinage as a *de facto* union characterised by life in common with characteristics of stability and permanence, between two persons of the same or different sexes, living as a couple.[50] Sweden, for its part, describes cohabitation as being formed by two persons living together in a relationship, on a permanent basis, and sharing a household.[51] Also Paraguay requires no minimum duration for a cohabitation to qualify as *de facto* community and to benefit from the provisions for *de facto* community as long as the legal requirements are

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[38] Prel. Doc. No 5/1992, see *supra* footnote No 3, at p. 114.
[39] See Art. 3(2) Partnership Law of Asturias (Spain), see also Cristina Gonzáles Beilfuss, "Spanien und Portugal", *in* Jens M. Scherpe / Nadjma Yassari, *Die Rechtsstellung nichtehelicher Lebensgemeinschaften – The Legal Status of Cohabitants*, Mohr Siebeck, Tübingen 2005, p. 256.
[40] See Art. 326 of the Portuguese *Código Civil, 24.07.1984* (hereinafter Civil Code of Peru).
[41] See Art. 1(1) Law of Portugal on *de facto* unions.
[42] Art. 3(2) Partnership Law of Aragon (Spain).
[43] Art. 1(1) Partnership Law of Catalonia (Spain).
[44] The Croatian law distinguishes different sex cohabitation and same sex cohabitation, for both of which a minimum duration of three years is needed. For different sex cohabitation see § 3 Croatian Family Law; for same sex cohabitation see § 2 Croatian Cohabitation Law, see also German translation in Bergmann / Ferid / Henrich, *Internationales Ehe-und Kindschaftsrecht,* Kroatien, Supplement 169, December 2006, pp. 45 *et seq.* and 77 *et seq*.
[45] Art. 173 *Código Civil, Decreto-Ley Número 106* (hereinafter Civil Code of Guatemala).
[46] Art. 118 *Código de Familia No 677, 11.10.1993*, last amended by *D.L.No 956, del 03.02.2006* (hereinafter Family Code of El Salvador).
[47] Art. 53 *Código de la Familia, Ley No 3, de 17.05.1994* (hereinafter Family Code of Panama).
[48] Art. 778(2) *Còdigo Civil del Estado de Jalisco, México, 25.02.1995* (hereinafter Civil Code of the State of Jalisco (Mexico)).
[49] Art. 778(2) Civil Code of the State of Jalisco (Mexico).
[50] Art. 515-8 French Civil Code.
[51] § 1 Swedish Cohabitation Act; see also Eva Ryrstedt, "Legal Status of Cohabitants in Sweden", in Jens M. Scherpe / Nadjma Yassari, *Die Rechtsstellung nichtehelicher Lebensgemeinschaften – The Legal Status of Cohabitants*, Mohr Siebeck, Tübingen 2005, p. 418.

fulfilled; but when the cohabitation has lasted more than five years there is a rebuttable presumption that the cohabitation constitutes a *de facto* union in the sense of the law.[52]

b) Exclusivity

26. There is an overall consensus that the cohabitation, in order to have legal effects, must comply with a condition of exclusivity. Accordingly, it is frequently specified that it can be formed only between two persons, exclusive of any other, living as a couple and not married or bound by a civil union.[53]

27. In the State of Jalisco (Mexico), exclusivity is ensured, with respect to inheritance, by providing that if the deceased cohabited with more than one person, none of them shall inherit.[54]

28. In Portugal, even though married persons are prevented from forming a cohabitation outside wedlock, it is nonetheless permitted when a separation and division of property has been ordered.[55] The situation is similar in Brazil: marriage to a third person is no impediment to unmarried cohabitation if the spouses are separated either legally or *de facto*.[56]

29. In France, however, there is no requirement of exclusivity for unmarried cohabitation. A married person can thus form a *concubinage* with a third person.[57]

c) Gender

30. Contrary to what could be asserted in 1992,[58] the criterion relating to the cohabitants' gender has in some jurisdictions changed, and there are now several approaches. The requirement that unmarried cohabitation may be formed only by persons of different sexes remains in several States, in various Latin America in particular. Some of these States, such as Peru,[59] Venezuela,[60] Bolivia,[61] Brazil[62] and El Salvador,[63] expressly provide that cohabitation may exist only between a man and a woman. Others, without being so specific, provide instead that unmarried cohabitation may be formed by persons having the legal capacity to enter into a marriage,[64] which usually implies that it may be formed only between persons of different sexes. Other jurisdictions, such as Croatia,[65] France,[66] New Zealand,[67] Catalonia (Spain)[68] and more recently also Uruguay,[69] recognise the possibility for both same-sex and different-sex

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[52] Art. 220 *Código Civil del Paraguay, Ley No 1183/85* (hereinafter Civil Code of Paraguay).
[53] See, for instance, Section 2D(1) New Zealand Property (Relationships) Act and Sections 4 and 5 of the Tasmanian *Relationship Act 2003, 17.09.2003,* (hereinafter Relationship Act of Tasmania (Australia)).
[54] Art. 2941 Civil Code of Jalisco (Mexico).
[55] Art. 2c) Law of Portugal on *de facto* unions.
[56] See Art. 1723 § 1 Civil Code of Brazil, see also Axel Weishaupt, in Bergmann / Ferid / Henrich, *Internationales Ehe-und Kindschaftsrecht*, Brazilien, 168. Supplement, October 2006, p. 30.
[57] Art. 515-8 French Civil Code; see Frédérique Ferrand, "Die Rechtstellung nichtehelicher Lebensgemeinschaften in Frankreich", in Jens M. Scherpe / Nadjma Yassari, *Die Rechtsstellung nichtehelicher Lebensgemeinschaften – The Legal Status of Cohabitants*, Mohr Siebeck, Tübingen 2005, p. 225.
[58] Prel. Doc. No 5/1992, see *supra* footnote No 3.
[59] See Art. 326 Civil Code of Peru.
[60] See Art. 767 of the Venezuelan *Código Civil, 26.07.1982, Número 2.9900 Extraordinario* (hereinafter Civil Code of Venezuela).
[61] See Art. 158 of the Bolivian *Código de Familia, Ley No 996, 4.4.1988* (hereinafter Family Code of Bolivia).
[62] See Art. 1723 of the Brazilian *Código Civil, Lei No 10.406, 10.01.2002* (hereinafter Civil Code of Brazil).
[63] See Art. 118 Family Code of El Salvador.
[64] Art. 217 Civil Code of Paraguay.
[65] Croatian law provides for both same sex and different sex unmarried cohabitation. Provisions on same sex cohabitation were introduced in 2003 in form of the new Croatian Partnership law to add to those on different sex cohabitation in the Croatian Family Law, see Dubravka Hrabar, "Legal Status of Cohabitation in Croatia", in Jens M. Scherpe / Nadjma Yassari, *Die Rechtsstellung nichtehelicher Lebensgemeinschaften – The Legal Status of Cohabitants*, Mohr Siebeck, Tübingen 2005, p. 403.
[66] See Art. 515-8 French Civil Code.
[67] See Art. 2 D(1) New Zealand Property (Relationships) Act.
[68] Art. 1 Partnership Law of Catalonia (Spain) for different-sex cohabitation and Art. 19 Partnership Law of Catalonia (Spain) for same-sex cohabitation.
[69] Uruguay is one of the most recent examples for a jurisdiction opening the possibility of a legally recognised unmarried cohabitation to same-sex couples. The law, *Unión Concubinaria, Ley No 18.246* (hereinafter Concubinage Union Law of Uruguay) was enacted in December 2007.

cohabitants of creating an unmarried cohabitation. Among these jurisdictions, some have adopted laws applying to all couples[70] while others have chosen to legislate separately, and have adopted legislation applying to same-sex cohabitants in order to make their situation similar to that of cohabitants of different sexes.[71] In Sweden, a first statute with respect to cohabitation, applicable to different-sex couples,[72] was followed by an equivalent statute relating to same-sex couples;[73] these acts were in 2003 replaced by a single act on cohabitation erasing the differences between cohabitation of same-sex and different-sex couples.[74]

d) Minimum age

31. Several Latin American States require the cohabitants to have the legal capacity to enter into a marriage and not to be subject to any legal impediment.[75] This includes the minimum age, from which an exception may be granted if the cohabitants have a child.[76] Elsewhere, the cohabitants are regularly required to have reached a minimum age of 18 in Croatia[77] and New Zealand,[78] or 16 in Portugal[79].

e) Other requirements or *indicia*

32. Certain States, such as New Zealand, provide a list of factors that may be taken into consideration to determine whether, in a specific case, there is an unmarried cohabitation. These factors include, in addition to those mentioned above, the nature and extent of the joint residence, the existence of sexual intercourse, the degree of financial dependency or mutual interdependency and any terms agreed between the partners regarding financial support, property, the use and acquisition of assets, the care and support of children, participation in household tasks, the degree of commitment to common living and the relationship's public and recognised nature.[80] However, none of these criteria may be taken to be mandatory, but the court may give them what weight it sees fit.[81]

2. Impediments

a) Prohibited degrees

33. Several States, including the Latin American States, apply the rules relating to legal capacity to enter into marriage,[82] and the impediments with respect to marriage, including prohibited degrees, *mutatis mutandis* to cohabitation. In Portugal, it is expressly stated that there may be no unmarried cohabitation between relatives in the direct line, in the collateral line up to the second degree or by affinity in the direct line.[83] In Croatia, it is provided that the cohabitants may not be relatives in the direct line.[84] On the other hand there are some jurisdictions that decided to protect so-called "caring" relationships.[85] This is a relationship which is not based on a marriage-like cohabitation

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[70] Art. 2D(1)(b) and (c) New Zealand Property (Relationships) Act, Art. 515-8 French Civil Code, for example.
[71] See Croatian Cohabitation Law for same sex cohabitation and §§ 3, 222 *et seq.* 258 Croatian Family Law for different sex cohabitation. See Arts 1-18 Partnership Law of Catalonia (Spain) for different-sex cohabitation and Arts 19-34 Partnership Law of Catalonia (Spain) for same-sex cohabitation.
[72] *Lag (1987:232) om sambors gemensamma hem*.
[73] *Lag (1987:813) om homosexuella sambor.*
[74] Swedish Cohabitation Act, see *supra* footnote 51.
[75] Art. 217 Civil Code of Paraguay.
[76] Art. 118 Family Code of El Salvador.
[77] § 3 Croatian Cohabitation Law (same sex cohabitation).
[78] Art. 2D (1)(a) New Zealand Property (Relationships) Act.
[79] Art. 2a) Law of Portugal on *de facto* unions.
[80] Art. 2D (2) New Zealand Property (Relationships) Act.
[81] Art. 2D (3) New Zealand Property (Relationships) Act.
[82] Art. 217 Civil Code of Paraguay.
[83] Art. 2d) Law of Portugal on *de facto* unions.
[84] § 3 Croatian Cohabitation Law.
[85] See also below Part II, B, 3.

but rather on domestic support and personal care.[86] The legal protection of a caring partnership is, for instance, possible in Tasmania (Australia), where the law distinguishes "significant relationship"[87] and "caring relationship"[88].

b) Undissolved marriage or registered partnership

34. This impediment overlaps with the requirement of exclusivity described above. It represents the equivalent of the ban on polygamy with respect to unmarried cohabitation.

c) Other impediments

35. Certain States have provided for other impediments to cohabitation. For instance, Portugal makes the existence of unmarried cohabitation subject to other impediments found in the laws relating to marriage, such as manifest insanity or a conviction for attempted homicide against the contemplated cohabitant or his or her spouse.[89]

3. Procedure

36. In most countries the existence of unmarried cohabitation will be determined according to the factual circumstances. However, in some jurisdictions certain formalities have to be fulfilled to give legal effect to the cohabitation. The required formalities can consist in a declaration to a court or other authority, the registration of a deed of relationship or other registration of the cohabitation. Returning to the distinction that was drawn earlier between unmarried cohabitation and registered partnership, only those partnerships which require registration as a constitutive element are, for the purpose of this Note, referred to as "registered partnerships". Not included in this category are therefore forms of cohabitation where the registration is merely a question of proof and whose existence is not affected by the registration.[90] However, there could be good reasons to draw a different distinction, especially where the unmarried cohabitation, although existing without registration, only deploys rights and duties after registration. In many Latin American States unmarried cohabitation needs to be recognised by a court in order to benefit from rights attached to it by law. For instance, in El Salvador, unmarried cohabitation has to be declared to a court.[91] In Guatemala, a declaration has to be made to the Mayor or a notary.[92] These declarations help in determining the beginning of cohabitation and enable the legislation to become effective. The new legislation of Uruguay on concubinage follows a similar logic. Partners, who have lived for five uninterrupted years in concubinage can submit a request for recognition of their concubinage to court and then have it registered in the national registry.[93]

37. The law of the Spanish autonomous community of Catalonia, which distinguishes different-sex and same-sex cohabitation, requires same-sex cohabitants to sign a deed in front of a notary.[94]

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[86] See Jens M. Scherpe, "Rechtsvergleichende Gesamtwürdigung und Empfehlungen zur Rechtsstellung nichtehelicher Lebensgemeinschaften", in Jens M. Scherpe / Nadjma Yassari, *Die Rechtsstellung nichtehelicher Lebensgemeinschaften – The Legal Status of Cohabitants*, Mohr Siebeck, Tübingen 2005, pp. 579, 582.
[87] See definition of "significant relationships", Section 4 Relationship Act of Tasmania (Australia).
[88] See definition of "caring relationships", Section 5 Relationship Act of Tasmania (Australia).
[89] Art. 2b) and e) Law of Portugal on *de facto* Unions.
[90] See for instance the Relationship Act of Tasmania (Australia) and the Partnership Laws of the Spanish autonomous communities of Asturias (Arts 1 and 3) and the Canary Islands (Art. 6).
[91] Art. 123 Family Code of El Salvador.
[92] Art. 173 Civil Code of Guatemala.
[93] Arts 4, 12 Concubinage Union Law of Uruguay.
[94] See Partnership Law of Catalonia, see also Cristina Gonzáles Beilfuss, "Spanien und Portugal", *supra* footnote 39, p. 269. See also Ulrich Daum, in Bergmann / Ferid / Henrich, *Internationales Ehe-und Kindschaftsrecht*, Spanien, 164. Supplement, December 2005, p. 135.

38. In the Netherlands many cohabitants conclude a cohabitation contract regulating the property effect of the unmarried cohabitation, known as a *Samenlevingscontract*, signed before a notary.[95] The aim is to establish legal certainty in an area where the Dutch law remains mainly silent. Over the course of the years different model contracts have been developed. A cohabitation contract is, however, not mandatory. Even though the usefulness of such a contract is acknowledged, it also has certain drawbacks, such as the fact that it cannot provide for all the issues arising in the event of termination of the cohabitation and does not adapt to changes, but requires amendment instead. Accordingly, it should be noted that even though it is popular in certain States, it is unknown or uncommon in several others.

D – Legal effects

39. As for the legal effects of unmarried cohabitation, and as pointed out by the Note of the Permanent Bureau of 1992,[96] there are several approaches at the domestic level, which may be divided into two categories: those States which have not legislated with respect to the effects of unmarried cohabitation, and those having legislated on the matter. The courts in the first group of States assume different positions when faced with specific cases. They may deny any right whatsoever, or apply rules applicable to other areas of the law, such as those with respect to corporations as regards property rights. The States which have legislated, for their part, have frequently done so unevenly, according to the issue and the effects sought.

40. In all cases, States are faced with a variety of concerns that may lead to contradictory solutions. On the one hand, there is a wish to protect the autonomy of persons who may have chosen not to marry, and on the other, there is the wish to protect any vulnerable party and the children, if relevant.

1. Property rights

a) Apportionment of property

41. Various approaches have been taken with respect to the apportionment of property when an unmarried cohabitation ends. On the one hand, there are States that grant cohabitants far-reaching rights by applying to the cohabitants the same rules as to married couples. For instance, in 2002, New Zealand replaced its Matrimonial Property Act by the Property (Relationship) Act. It thereby abolished to a large extent the distinction between married couples, unmarried cohabitants, same-sex persons and persons of different sexes, by laying down rules generally providing for an equal apportionment of property at the end of the cohabitation.[97] This legislation provides that, if the relationship qualifies as an unmarried cohabitation, on the basis of the criteria laid down by the previous section, it then produces the same financial effects as marriage. This means that the cohabitants will be entitled to equal shares of the family home, family property and any other property of the relationship.[98] Thus, contributions to a pension scheme by one of the cohabitants during the cohabitation will also be equally shared at the end of the cohabitation. However, departures from the principle of equal apportionment are permitted in exceptional circumstances where such an apportionment would be unfair.[99] It is also provided that the cohabitants may avoid application of the New Zealand Property (Relationships) Act, by entering into an agreement.[100]

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[95] See Katharina Boele-Woelki / Wendy Schrama, "Die nichteheliche Lebensgemeinschaft im niederländischen Recht", *supra* footnote 9, pp. 336, 337.
[96] Prel. Doc. No 5/1992, see *supra* footnote No 3.
[97] Art. 11(1) New Zealand Property (Relationships) Act.
[98] *Idem*.
[99] Art. 13(1) New Zealand Property (Relationships) Act.
[100] Art. 21 New Zealand Property (Relationships) Act.

42. The Swedish Cohabitation Act provides for a value based division of certain property[101] when the cohabitation ends and one of the cohabitants applies for that division within a year after the end of the cohabitation.[102] The cohabitants may, however, enter into an agreement to exclude their cohabitation from the division of property or to exclude certain parts of their property from division.[103]

43. In Paraguay, the rules relating to the matrimonial status of community property are applied, *mutatis mutandis*, to the *de facto* community created by the cohabitants,[104] regardless of the duration of cohabitation if the relevant requirements are satisfied. It may be added that unless there is evidence to the contrary, the *de facto* corporation is presumed in all cases where the cohabitation lasted more than five years.[105]

44. In Venezuela, joint ownership of property is also presumed, unless there is evidence to the contrary, in all cases of non-matrimonial unions when the man or woman, as the case may be, proves that he or she lived in that condition on a permanent basis, even if the assets in respect of which the establishment of joint ownership is sought were acquired by one of them only.[106] It should be noted, however, that such a presumption is effective only between the cohabitants, among their heirs and between one cohabitant and the other's heirs.[107]

45. In Peru, the rules relating to the property regime of joint ownership of property acquired during marriage are applied to unmarried cohabitation, which has a minimum duration of two years.[108]

46. Other States provide certain rights to cohabitants with respect to the apportionment of property, without granting them all the rights provided to married couples. Thus in Hungary, cohabitants are joint owners but on a more restrictive basis than spouses. Unlike spouses, who own in equal shares, the cohabitants are owners in proportion to their respective contributions made at the time of acquisition of a specific asset. It is specified that household work is treated as a contribution to the acquisition of assets. It has also been provided that if each cohabitant's proportion cannot be determined, the asset at issue is presumed to have been acquired in equal shares.[109]

47. Finally, there are States which, not having legislated with respect to unmarried cohabitation, assume different positions when dealing with specific cases. Thus, a specific case of cohabitation may end in a denial of any right whatsoever, or the application of rules relating to other areas of the law, such as those with respect to contract, unjust enrichment or corporations as regards property rights. Such an approach is used in Germany,[110] where there is no legislation on unmarried cohabitation, and in the Netherlands,[111] where there are only very few provisions on unmarried cohabitation and none concerning property rights of the cohabitants.

b) Maintenance

48. As regards maintenance, there is also a wide range of positions, the extremes being States treating cohabitants or former cohabitants like spouses or former spouses or granting them similar rights, and States in which partners of an unmarried cohabitation have no maintenance obligations at all.

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[101] As defined in §§ 3 *et seq*. Swedish Cohabitation Act.
[102] See § 8 Swedish Cohabitation Act; see also Eva Ryrstedt, *supra* footnote 51, p. 422.
[103] § 9 of the Swedish Cohabitation Act.
[104] Art. 221 Civil Code of Paraguay.
[105] Art. 220 Civil Code of Paraguay.
[106] Art. 767 Civil Code of Venezuela.
[107] *Idem.*
[108] Art. 326 Civil Code of Peru.
[109] § 578/G(1) of the Civil Code of Hungary.
[110] See Dominique Jakob, *Die Eingetragene Lebensgemeinschaft im Internationalen Privatrecht*, Köln, 2001, p. 114 with further references.
[111] See Katharina Boele-Woelki / Wendy Schrama, "Die nichteheliche Lebensgemeinschaft im niederländischen Recht", *supra* footnote 9, pp. 313, 334 *et seq*.

49. New Zealand is an example of the first category: its legislation has extended the obligation to provide maintenance on a permanent basis to former cohabitants.[112] In Tasmania (Australia), a partner's eligibility for maintenance is subject to a requirement of an uninterrupted relationship lasting at least two years.[113]

50. In Peru the legislation provides that when the cohabitation is terminated by one cohabitant's unilateral decision, the judge may order, at the option of the abandoned cohabitant, payment of a sum of money as indemnification or of regular maintenance, in addition to apportionment of the property based on the property regime of joint ownership of property acquired during the partnership,[114] to which he or she is entitled in the same way as a spouse. In Bolivia, in the event of unilateral termination, the abandoned cohabitant may immediately obtain the portion of community property to which he or she is entitled and if he or she has not been unfaithful or committed other serious misconduct, he or she may obtain a regular "assistance" payment for himself or herself and, in all cases, for his or her dependent children.[115] It should be added that if termination is carried out with a view to entering into a union with a third party, the abandoned cohabitant may object to the marriage and demand payment of the maintenance due to him or her.[116]

51. Finally, Croatian Law provides that a partner not having sufficient resources for his or her own maintenance, who is unable to obtain them from his or her personal assets and who is unable to work or to find work, is entitled to maintenance or support from the other cohabitant.[117] This claim can also be raised after the end of the cohabitation; an action for maintenance can be brought up to six month after the end of the cohabitation.[118] The court may then order the payment of maintenance for a duration of one year and may, under certain circumstances, extend that period.[119] A court may deny an application for maintenance, however, where it would be unfair to the other partner.[120]

52. On the other hand there are legal systems in which partners of an unmarried cohabitation have no maintenance obligation at the end of the cohabitation; this seems to be more common. Included in this category are, of course, jurisdictions that have so far refrained from regulating unmarried cohabitation at all, like Germany and the Netherlands,[121] but also some jurisdictions that have regulated on unmarried cohabitation (at least partially), like Hungary,[122] Norway[123].

c) Compensatory allowance

53. Here also, the positions vary from one State to another. Certain States provide an opportunity to obtain compensatory allowance whereas others have no rules in this respect. The New Zealand courts may order payment of a lump sum or transfer of property by one cohabitant to the other, when it appears at the time of division of the relationship property that the income or standard of living of one of the cohabitants is likely to be significantly higher than that of the other because of the effects of the

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[112] See Arts 63 *et seq*. New Zealand Family Proceedings Act 1980.
[113] Section 37(1) Relationship Act of Tasmania (Australia).
[114] Art. 326(3) Civil Code of Peru.
[115] Art. 169(1) Family Code of Bolivia.
[116] Art. 169(2) Family Code of Bolivia.
[117] For same sex cohabitation see § 6(1) Croatian Cohabitation Law.
[118] For same sex cohabitation see § 6(2), (3) Croatian Cohabitation Law; for different sex cohabitation see § 222 Croatian Family Law in connection with § 217 Croatian Family Law. It has to be recalled that a cohabitation creating these legal effects under Croatian Law requires a minimum duration of three years or – in the case of the different sex marriage – when a child was born out of that relationship.
[119] For same sex cohabitation see § 8(1), (2) Croatian Cohabitation Law; for different sex cohabitation see § 224 (1), (2) Croatian Family Law.
[120] For same sex cohabitation see § 7 Croatian Cohabitation Law; for different sex cohabitation see § 223 Croatian Family Law.
[121] See Katharina Boele-Woelki / Wendy Schrama, "Die nichteheliche Lebensgemeinschaft im niederländischen Recht", *supra* footnote 9, pp. 307 *et seq*., 365.
[122] See Lajos Vékás, László Ember Bergmann / Ferid / Henrich, *Internationales Ehe-und Kindschaftsrecht*, Ungarn, 156. Supplement, April 2004, pp. 22, 23.
[123] See John Asland, "Legislation on Informal Cohabitation in Norway", in Katharina Boele-Woelki (ed.), *Common Core and Better Law in European Family Law*, Intersentia, Antwerp – Oxford, 2005, p. 299.

division of functions between them during the relationship.[124] As has been pointed out, in Peru, pursuant to one cohabitant's unilateral decision to terminate the cohabitation, a judge may order, at the option of the abandoned cohabitant, payment of regular maintenance or a lump sum as indemnification. It is also provided that in the case of a cohabitation not meeting the requirement of two years' minimum duration, the cohabitant feeling injured has a right of action for unjustified enrichment.[125] Bolivia provides that since assistance and co-operation are obligations inherent in cohabitation, they may not be returned or offset in any way.[126]

2. Rights with respect to financial matters (taxation, welfare and pensions)

54. Obviously, not all States recognise the same privileges and obligations for all kinds of unions. Public law legislation is highly fragmentary as regards cohabitants' rights. Most States do not provide for equality of treatment between unmarried cohabitants and spouses. Accordingly, we shall only point out here certain recent developments in which the cohabitant's situation has been assimilated to that of a spouse.

55. For instance, in Norway, cohabitants enjoy, with respect to certain specific rules, the same rights and obligations with respect to welfare as spouses[127] if they have or have had children together or have previously been married. When these requirements are satisfied, cohabitants are also given equal status with married spouses in regard to taxation.[128] Cohabitants are also exempted from payment of inheritance duty.[129]

56. In Portugal, certain tax rules, in particular with respect to the tax on the income of private persons, applicable to non-separated spouses, also apply, to unmarried cohabitants.[130]

57. In Hungary, a cohabitant is entitled, like a spouse, to a widow(er)'s pension if the cohabitants had a child together and lived together for one year without interruption or, if – where there are no children – they lived together for ten years without interruption.[131]

3. Family rights with respect to relations between partners

58. In general, the position assumed by the majority of States that have legislated on unmarried cohabitation is that it has no effect on the cohabitants' names and creates no family relationship. However, there are certain exceptions. In Brazil, for instance, before the introduction of the Civil Code in 2002 women could apply to use, subject to certain requirements, her cohabitant's surname.[132] Although the provisions on unmarried cohabitation in the Brazilian Civil Code do not make any reference to issues of naming, legal authors still consider that the old rule should be adhered to drawing analogy with the rules on spouses' names.[133]

59. In addition, very few States have expressly provided for a duty of faithfulness or assistance, but certain Latin American States have done so. For instance, in Bolivia, the legislation provides that cohabitants are subject to mutual duties of faithfulness, assistance and co-operation. Furthermore, unfaithfulness is a ground for termination of

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[124] Art. 15(1) New Zealand Property (Relationships) Act.
[125] See Art. 326(4) Civil Code of Peru.
[126] Art. 161(3) Family Code of Bolivia.
[127] Several provisions of the *Lov om folketrygd, Lov nr 19*, 28.02.1997 (Norwegian Social Security Act), see John Asland, *supra* footnote 123, pp. 300, 301.
[128] See John Asland, *supra* footnote 123, p. 301 with reference to *Lov om skatt av formue og inntekt, Lov nr 14*, 26.03.1999 (Norwegian Taxation Act).
[129] See John Asland, *supra* footnote 123, p. 301.
[130] See Arts 4c) and 6 of the Portuguese *Lei 6/2001, de 11.05.2001 Adopta medidas de protecção das pessoas que vivam em economia comum*, which addresses people living in an economic community for at least two years.
[131] See Orsolya Szeibert Erdös, "Unmarried Partnership in Hungary", in Katharina Boele-Woelki (ed), *Common Core and Better Law in European Family Law*, Intersentia, Antwerp – Oxford, 2005, p. 322.
[132] See Art. 57 § 2 of the Brazilian *Lei No 6515, de 26.12.1977*, see Axel Weishaupt, *supra* footnote 56, p. 36.
[133] See Axel Weishaupt, *supra* footnote 56, p. 37 and references.

the union, if the cohabitation did not continue once the unfaithfulness was known.[134] Also the Brazilian law provides for a mutual duty of faithfulness and assistance.[135] For its part, the Croatian legislation specifies that one of the legal effects of the existence of cohabitation is the entitlement to mutual assistance between the cohabitants.[136]

a) Protection of the family home

60. As regards protection of the family home, two approaches may be observed. On the one hand, there are States which apply to unmarried cohabitants the rules for protection of the family home applicable to spouses, and those States which have decided not to do so. For instance, in Portugal, in the event of death of the cohabitant owning the joint residence, the surviving cohabitant has a right of occupation *in rem*, for a term of five years, and has a right of first refusal over its sale for the same duration.[137] There are exceptions to this principle in certain cases, including the presence of contrary testamentary dispositions.[138] In Hungary, however, a cohabitant's right to use the family home terminates at the same time as the cohabitation.[139]

b) Inheritance

61. Various approaches have been adopted with respect to inheritance. In certain States, the surviving cohabitant inherits on the same basis as a spouse. In El Salvador, for instance, each cohabitant is entitled to succeed the other intestate, with the same rank as a spouse.[140] The situation is similar in the state of Jalisco (Mexico) where the provisions relating to inheritance between spouses will be applied *mutatis mutandis* to a cohabitant, when the requirements relating to duration are satisfied. However, if the deceased cohabited in the sense of the law with more than one person, none of them may inherit.[141] In Bolivia, it is provided that, if the cohabitation is ended by death, the surviving partner inherits half the common property and the other half is apportioned among the children if any, and if none, in accordance with the rules applicable to succession.[142] As regards the deceased's own assets, the cohabitant's interest in and eligibility for them are the same as for each child.[143]

62. Other States have chosen instead to not provide for an intestate inheritance right of the cohabitant. Here the only way the unmarried cohabitant can inherit is by way of testamentary disposition. This is, for instance, the case in Hungary[144] and Norway[145].

63. The possibility of testamentary dispositions in favour of a cohabitant may, however, be restricted. In many jurisdictions testamentary dispositions are subject to certain restrictions in order to protect persons who would in their absence be the heirs, such as, for instance, the children of the deceased. If these persons are not left with a share of the estate which amounts to a minimum legal portion defined by the succession law, they can claim this legal portion from the person who benefited from the testamentary disposition. The Netherlands, a country generally not providing any rules on unmarried cohabitation, introduced a new rule with respect to succession,[146] which offers the possibility of protecting the surviving cohabitant against claims of legal heirs. According to that law a testamentary disposition may determine that the claims for the minimum legal portion may only be raised after the death of the second cohabitant or after he or

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[134] Art. 161(1)(2) Family Code of Bolivia.
[135] Art. 1724 Civil Code of Brazil.
[136] See § 2 Croatian Cohabitation Law.
[137] Art. 4(1) Portugal Law on *de facto* unions.
[138] Art. 4(2) Portugal Law on *de facto* unions.
[139] See Orsolya Szeibert Erdös, *supra* 131, p. 322.
[140] Art. 121 Family Code of El Salvador.
[141] Art. 2941 Civil Code of Jalisco (Mexico).
[142] Art. 168(1) Family Code of Bolivia.
[143] Art. 168(2) Family Code of Bolivia.
[144] See Orsolya Szeibert Erdös, *supra* 131, p. 320.
[145] Eva Ryrstedt, *supra* footnote 51, p. 451.
[146] Katharina Boele-Woelki / Wendy Schrama, "Die nichteheliche Lebensgemeinschaft im niederländischen Recht", *supra* footnote 9, pp. 350, 351

she enters into marriage or another cohabitation.[147] The conditions are that the testamentary disposition is signed in front of a notary and that the cohabitants share a household together.[148]

64. In Catalonia (Spain), there is a distinction between same-sex and different-sex couples. In the case of a couple of different sexes, the surviving partner is entitled to retain the moveable assets in the joint residence and shall be entitled, *inter alia*, during the year following the decease, to reside in the family home belonging to the deceased partner and to maintenance from the estate. However, the surviving partner is not among the potential heirs of his or her partner, owing to the availability of marriage for couples of different sexes.[149] In the case of same-sex couples, the rights are the same except that the surviving partner may not claim maintenance from the estate, but may be the deceased's heir.[150]

4. Family rights relating to children

65. Establishment of the parent-child relationship (filiation) between a child and the mother's cohabitant is more difficult than where the parents are married to one another. This is because a presumption of paternity, provided for by many jurisdictions where parents are married, is not applicable to cohabiting couples.

66. In Hungary, for instance, the cohabitant of the mother may - as any man - acknowledge paternity of a child with the mother's consent[151] on a voluntary basis.[152] Similarly in Quebec (Canada), cohabitants who are not married and have not entered into a civil union do not enjoy the same presumption as spouses or cohabitants in a civil union, and the child's mother's cohabitant will accordingly be required to acknowledge his child's paternity before the Registrar of civil status, in order to create a parent-child relationship.[153] This is the case in many jurisdictions.

a) Adoption

67. Even though adoption is often reserved for married spouses or, in certain cases, for registered partners, adoption is sometimes allowed, subject to strict requirements, for single persons or unmarried cohabitants. When permitted between unmarried cohabitants, a further distinction is sometimes made between same-sex cohabitants and different-sex cohabitants. Thus, in Portugal, even though unmarried cohabitants are now allowed to adopt, this is reserved for cohabitants of different sexes.[154] In Quebec (Canada), however, any person of full age may, alone or jointly with another person, adopt a child.[155] In addition, the Constitutional Court of South Africa delivered a leading ruling in 2002 whereby it held the provisions of the South African Child Care Act and the Guardianship Act, which restricted the possibility of adopting a child to married couples and single persons to be inconsistent with the Constitution. This cleared the way for adoption by same-sex couples.[156] In England, the Children and Adoption Act 2002 has been amended and now allows unmarried couples to adopt a child, regardless of their gender.[157]

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[147] See Book 4, Arts 82 and 83 Dutch Civil Code, see also Katharina Boele-Woelki / Wendy Schrama, "Die nichteheliche Lebensgemeinschaft im niederländischen Recht", *supra* footnote 9, pp. 350, 351.
[148] *Ibid*.
[149] Art. 18 Partnership Law of Catalonia.
[150] *Ibid.,* Art. 34 Partnership Law of Catalonia. The same-sex partner thus has a privileged status under Catalonian law. It has, however, to be kept in mind that there are stricter requirements for same-sex partnerships under Catalonian law than for different sex partnerships, see Part I, B, 3. See also Cristina Gonzáles Beilfuss, "Spanien und Portugal", *supra* footnote 39, p. 269. See also Ulrich Daum, *supra* footnote 94, pp. 135, 136.
[151] Consent of the child is needed, when the child is more than 14 years old.
[152] Lajos Vékás, László Ember, in Bergmann / Ferid / Henrich, *Internationales Ehe-und Kindschaftsrecht,* Ungarn, 165. Supplement, April 2004, p. 29.
[153] Art. 540 of the Civil Code of Quebec (Canada) *a contrario*.
[154] Art. 7 Law of Portugal on *de facto* unions.
[155] Art. 546 Civil Code of Quebec (Canada).
[156] Nina Dethloff, *Same-Sex Parents in a Comparative Perspective*, in International Law FORUM du droit international, Vol. 7, No 3 (2005), pp. 195, 197.
[157] *Ibid*., p. 197; see Art. 50 of the Adoption and Children Act 2002.

68. It should be borne in mind, however, that with respect to international adoption, under the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*,[158] even though a receiving State may allow unmarried cohabitants to adopt, the State of origin may, in effect,[159] deny the adoption of a child by unmarried parents in the receiving State.

b) Assisted reproduction

69. Despite the general rule that only married couples, and in the case of Quebec (Canada), couples in civil unions, may have recourse to assisted reproduction, there are now some exceptions, allowing unmarried cohabitants also to have recourse to it. This is the case, for instance, in France[160] where couples of different sexes having cohabited for more than two years may have recourse to artificial insemination.

E – Termination of the cohabitation

70. In general, an unmarried cohabitation is terminated by the unilateral or mutual decision of one or both of the cohabitants or by the death of one. Certain States also provide that a marriage or registered partnership between the cohabitants or with a third party may put an end to the unmarried cohabitation. The factual termination of an unmarried cohabitation remains without consequences in many legal systems. In legal systems that have adopted rules on unmarried cohabitation various approaches have been taken in regard to the consequences of the termination of a cohabitation, often depending on the reason for termination (decision of one of or both the cohabitants or caused by death). Thus, with respect to the apportionment of the cohabitating couple's property, maintenance obligations, or protection of the principal residence in cases of inheritance, different solutions have been found, as set out above in Part I, C, 1.

[158] Hereinafter 1993 Hague Intercountry Adoption Convention.
[159] By virtue of Art. 17 of the 1993 Hague Intercountry Adoption Convention.
[160] Art. L2141-2 of the *Code de la santé publique* (French Public Health Act) as amended by *Loi 2004-800, 6.8.2004*.

PART II – RECENT DEVELOPMENTS WITH RESPECT TO REGISTERED PARTNERSHIPS IN INTERNAL LAW

A – Definition of a registered partnership

71. In 1989, Denmark was the first State to institute a system of registered partnership, thereby offering same-sex couples an opportunity to make their unions formal and accordingly to assume certain rights and duties. This initiative, thought to be isolated at the time, has spread, first through Scandinavia and Continental Europe, then to the Americas, the Pacific, and is even attempting forays into Asia.[161] The purpose of this section is not to deal with each system in detail nor to spell out all their specific features, but rather to outline them and to highlight the main similarities and differences among the systems where a form of registered partnership has been set up or is currently under consideration.

B – Types of registered partnership

72. The various systems of registered partnership can be distinguished according to different criteria.

1. Distinction of registered partnerships by gender requirement

73. Using the distinguishing feature of a gender requirement, two groups of registered partnerships can be identified. There are legal systems that reserve registered partnerships for same-sex couples and those that allow, both same-sex and different-sex couples to register their partnership.

74. Jurisdictions that have created a system of registered partnerships available only to same-sex couples are, *inter alia*, Germany,[162] Denmark, the United States of America state of Connecticut,[163] New Jersey,[164] New Hampshire,[165] and Vermont,[166] the Czech Republic,[167] Finland, Iceland, Norway, Slovenia, Sweden, Switzerland, and the United Kingdom (England and Wales, Northern Ireland and Scotland). In many of these legal systems registered partnership is meant to serve as a "substitute" for marriage for same-sex couples – although usually not providing exactly the same effects as marriage[168] – while marriage remains an institution reserved for couples of different sexes.

75. Jurisdictions that adopted a model of allowing both same-sex and different -sex couples to register a partnership are, for instance, Belgium,[169] the Netherlands,[170] Quebec (Canada),[171] the Autonomous City of Buenos Aires

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[161] It was announced in October 2003 that Taiwan was drafting a legislation bill on registered partnership for same-sex couples, see < http://www.taipeitimes.com/News/taiwan/archives/2003/10/28/2003073664 > (website last consulted in March 2008). A relevant law has, however, not yet been adopted.
[162] § 1 German Registered Partnership Law.
[163] Section 2 (2) Civil Union Act of Connecticut (USA).
[164] Section 2 of the 212th Legislature, Assembly, No 3787 (revises the marriage laws; establishes civil unions; establishes the "New Jersey Civil Union Review Commission") (hereinafter Civil Union Law of New Jersey (USA)).
[165] Section 457-A:1 of Title XLIII Domestic Relations, Chapter 457-A, effective since 1 January 2008 (hereinafter Civil Union Law of New Hampshire (USA)).
[166] 15 Vermont Code Chapter 23, § 1202(2) as amended by the Civil Union Act of Vermont (USA).
[167] § 1 of the *Sb. o registrovaném partnerství a o změně některých souvis;* Law No 115/2006, in force since 1.7.2006 (hereinafter Czech Registered Partnership Law); see also Milana Hrušáková, "Tschechisches Gesetz über die registrierte Partnerschaft", *FamRZ* 2006, pp. 1337-1339 and Petr Bohata, Bergmann / Ferid / Henrich, *Internationales Ehe-und Kindschaftsrecht,* Tschechische Republik, 172. Supplement, July 2007, pp. 106 *et seq*.
[168] The effects of the registered partnership differ from country to country, see below Part II, D.
[169] § 1475 (1) Belgian Civil Code; see also Ian Curry-Sumner, *supra* footnote 22, p. 43.
[170] Book 1, Art. 80a Dutch Civil Code.
[171] See Art. 521.1. Civil Code of Quebec (Canada), see also Winifred Holland, *Legal Status of Cohabitants in Canada*, in *Die Rechtsstellung nichtehelicher Lebensgemeinschaften – The Legal Status of Cohabitants*, Mohr Siebeck, Tübingen 2005, p. 488.

(Argentina),[172] France, Luxembourg, New Zealand[173] and the Spanish autonomous communities of the Balearic Islands,[174] the Basque Country,[175] Cantabria,[176] the Canary Islands,[177] Estremadura,[178] Madrid[179] and Valencia[180].

76. Some of these States have also opened the institution of marriage to same-sex couples.[181] Registered partnership in these States is an alternative to marriage, whereas in many of the States that do not know same-sex marriage it remains the only way for same-sex couples to gain legal protection of their relationship.

2. Distinction between strong or weak forms of registered partnerships

77. Another way to differentiate the systems of registered partnerships is to distinguish them by their effects. In this respect it is possible to speak of "weak" or "strong" forms of registered partnerships.[182] Jurisdictions with a weak form of registered partnership tend to limit its effects to property rights and rights with respect to fiscal matters. The States adopting a strong form of registered partnership, for their part, have provided for broader effects, some even equivalent to marriage.

3. Distinction by function given to registered partnerships in a legal system

78. Registered partnerships may also be distinguished by reference to their different functions. As indicated above, in many systems that have reserved registered partnerships for same-sex couples, the partnership functions as a substitute for marriage which is not available for same-sex couples in these systems. Hence these systems tend to provide effects for registered partnerships that are close or even identical to the effects of marriage in their system. Also the requirements for formation and dissolution of these partnerships tend to correspond to those for marriage.

79. Among the systems that allow, both same-sex and different-sex couples to register a partnership there is a wider range in regard to the effect. One can find "weak" and "strong" forms of partnerships among those legal systems. Registered partnership may function as an institute close to marriage but it may also function as simple contractual protection of certain rights in the relationship.

80. There is a further category of registered partnership which serves a different function. In some jurisdictions it is possible to register so-called "caring" relationships. This is a relationship which is not based on a marriage-like cohabitation but rather on domestic support and personal care.[183] Such a relationship can, for instance, be registered in Belgium.[184] A caring relationship can also be registered in Tasmania[185] (Australia), but since registration in Tasmania is not a constituting element of the

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[172] Art. 1 a) Civil Union Law of the Autonomous City of Buenos Aires (Argentina).
[173] Section 4(1) Civil Union Act of New Zealand.
[174] Art. 1 Partnership Law of the Balearic Islands (Spain); see also Ulrich Daum, *supra* footnote 94, p. 91.
[175] Art. 1(2) of the *Ley 2/2003, de 7 de mayo, reguladora de las parejas de hecho, del País Vasco,* in *Boletín Oficial del País Vasco*, 23.05.2003 (hereinafter Partnership Law of the Basque Country (Spain)).
[176] Art. 1(2) of the Cantabrian *Ley 1/2005, de 16.05.2005, de Parejas de Hecho de la Comunidad Autónoma de Cantabria,* in *BOE de 24.05.2005* (hereinafter Partnership Law of Cantabria (Spain)).
[177] Art. 1 Partnership Law of the Canary Islands (Spain).
[178] Art. 1 of the *Ley 5/2003, de 20.03.2003, de parejas de hecho de la Comunidad Autónoma de Extremadura, BOE 9.05.2003* (hereinafter Partnership Law of Extremadura (Spain)).
[179] Arts 1, 2 of the *Ley 11/2001, de 19.12.2001, sobre parejas de hecho, de Madrid, BOE 5.03.2002* (hereinafter Partnership Law of Madrid (Spain)).
[180] Art. 1 of the *Ley 1/2001, de 06.04.2001, por la que se regulan las unions de hecho, de Valencia,* in *BOE 10.05.2001* (hereinafter Partnership Law of Valencia (Spain)).
[181] Belgium introduced same-sex marriages in June 2003 and the Netherlands introduced same-sex marriages in April 2001.
[182] See also Ian Curry-Sumner, "Uniform Patterns Regarding Same-Sex Relationships", in *International Law FORUM du droit international*, Vol. 7, No 3 (2005), p. 192.
[183] See Jens M. Scherpe, *supra* footnote 86, pp. 579, 582.
[184] See Ian Curry-Sumner, *All's well that ends registered?*, see *supra* footnote 22, pp. 44, 45; Walter Pintens, "Die Rechtsstellung nichtehelicher Lebensgemeinschaften in Belgien", in Jens M. Scherpe / Nadjma Yassari, *Die Rechtsstellung nichtehelicher Lebensgemeinschaften – The Legal Status of Cohabitants*, Mohr Siebeck, Tübingen 2005, p. 286.
[185] See Section 5 Relationship Act of Tasmania (Australia).

relationship, the partnership law of Tasmania is dealt with under the category of unmarried cohabitation.

C – Formation of the partnership

1. Requirements for validity

81. Formation of a registered partnership is subject to a series of requirements and formalities to be completed before the competent authority of the jurisdiction in question may register a partnership. Though they may vary from one legal system to another, we shall review the requirements found most frequently in the systems providing for registered partnerships.

a) Exclusivity

82. The exclusivity requirement is almost universal. This requirement implies that the partnership is to be entered into by two persons only, and that these two persons are to be free of any earlier commitment, whether by marriage or another registered partnership.

83. All jurisdictions having legislated with respect to registered partnerships follow the first principle, *i.e.*, that the partnership is to be registered between only two persons, exclusive of any others.[186] Thus, they have all refused to create a new institution that would sanction an equivalent to the concept of polygamy.

84. Also, as regards the second principle, *i.e.*, that the two persons are to be free of any previous commitment, most jurisdictions having legislated with respect to registered partnership comply with this requirement.[187] In certain Spanish autonomous communities,[188] however, partners not having divorced but having been legally separated may enter into a registered partnership.

85. In certain countries, such as the Netherlands and New Zealand, spouses may convert their marriage into a registered partnership and *vice versa*.[189] In the Netherlands this option is frequently[190] used in practice by spouses in order to have access to a less demanding procedure for dissolution.[191]

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[186] See, *inter alia*, Art. 2 Registered Partnership Law of Andorra; Art. 1(a) Civil Union Law of the Autonomous City of Buenos Aires (Argentina); Art. 1475(1) Belgian Civil Code; Section 53 Vital Statistics Act of Nova Scotia (Canada); Art. 521.1 Civil Code of Quebec (Canada); § 1 Danish Registered Partnership Law; § 1 Finnish Registered Partnership Law; Art. 515-1 French Civil Code; § 1(1) German Registered Partnership Law; Art. 1 of the Icelandic *Lov om registreret partnerskab, Lov nr. 87/1996, as amended by Aenderingslov nr. 52/2000* (hereinafter Icelandic Registered Partnership Law); Art. 2 Luxemburg Registered Partnership Law; Book 1, Art. 80a(1) Dutch Civil Code; Art. 4(1) Civil Union Act of New Zealand; § 1 Norwegian Registered Partnership Act; Chapter 1, § 1 Swedish Registered Partnership Law; Arts 1(1), 2(1) Partnership Law of the Balearic Islands (Spain); Art. 1(2) Partnership Law of the Basque Country (Spain); Arts 1 and 2(1) Partnership Law of Valencia (Spain); for England and Wales Section 2(1) of the UK Civil Partnership Act; for Scotland Section 85(1) of the UK Civil Partnership Act; for Northern Ireland Section 137(1) of the UK Civil Partnership Act.

[187] See, *inter alia*, Art. 5 Civil Union Law of the Autonomous City of Buenos Aires (Argentina); Section 4 (1) Relationship Act of Tasmania (Australia); Art. 521.1 Civil Code of Quebec (Canada); § 2 Finnish Registered Partnership Law; Art. 515-2 French Civil Code; § 1 German Registered Partnership Law; Art. 4(2) Luxemburg Registered Partnership Law; Book 1, Art. 80a Dutch Civil Code; Art. 4(1) Civil Union Act of New Zealand; Chapter 1, § 3 Swedish Registered Partnership Law; for England and Wales Section 3 of the UK Civil Partnership Act; for Scotland Section 86 of the UK Civil Partnership Act; for Northern Ireland Section 138 of the UK Civil Partnership Act.

[188] See, for instance, Art. 3(1)b) Partnership Law of Extremadura (Spain); Art. 2(1)b) Partnership Law of Madrid (Spain); Art. 4(4) b) Partnership Law of Cantabria (Spain).

[189] See Book 1, Arts 77a and 80g of the Dutch Civil Code; Section 18 Civil Union Act of New Zealand.

[190] In 2005, out of 11,307 partnerships registered 5,045 were marriages transformed into registered partnerships; in 2006, out of 10,801 registered partnerships 3,953 were formerly marriages; see Central Statistics Bureau of the Netherlands, at < http://statline.cbs.nl >.

[191] See Katharina Boele-Woelki, "Registered Partnership and Same-Sex Marriage in The Netherlands" in Katharina Boele-Woelki, Angelika Fuchs, *Legal Recognition of Same-Sex Couples in Europe*, Intersentia, 2003, p. 48.

86. Conversely, certain systems do not prevent a registered partner from marrying the partner or a third party, thereby automatically putting an end to the partnership.[192]

b) Gender

87. As stated above,[193] some jurisdictions have created a system of registered partnerships only available to same-sex couples while others have opened them to both same-sex and different-sex couples.

c) Age

88. As regards the minimum age required to enter into a registered partnership, many jurisdictions subject the partners to the same requirements as for marriage. Some refer directly to the age requirements for marriages including provisions on exceptions to the minimum age. Others expressly regulate the minimum age for registered partnerships and possible exceptions.

89. The partners are regularly required to have reached the age of 18; that is the case, for instance, in Germany,[194] Belgium,[195] the Czech Republic,[196] France,[197] Quebec (Canada),[198] Slovenia[199] and in the Netherlands[200]. In Nova Scotia (Canada) the minimum age to enter into a domestic partnership is 19.[201] According to the UK Civil Partnership Act the minimum age to register a civil partnership in England, Wales, Scotland and Northern Ireland is 16.[202] However, if a person over 16 but under the age 18 wishes to register a partnership in England, Wales or Northern Ireland, parental consent is required, or in default, permission from a Court.[203] This exception is the same as for marriage. In several jurisdictions, such as for instance the Basque Country (Spain), Extremadura (Spain) and Madrid (Spain), emancipated minors also have access to a registered partnership, subject to a few exceptions.[204] Dutch law, for its part, provides that a dispensation may be granted by the minister of justice for good cause.[205] In the Netherlands the registration of a partnership is also allowed under the age of 18 when a woman is pregnant or has given birth and she and her prospective partner have

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[192] See, *inter alia*, Art. 17(1)d) Registered Partnership Law of Andorra; Art. 8(1)(d) Partnership Law of the Balearic Islands (Spain); Art. 18(d) and (e) Partnership Law of the Basque Country (Spain); Art. 5(1)b) Partnership Law of Estremadura (Spain); Art. 6(1)e) Partnership Law of Madrid (Spain); Art. 1476(2) Belgian Civil Code; Art. 515-7 French Civil Code; Art. 13(1) Luxemburg Registered Partnership Law; Section 55c) Vital Statistics Act of Nova Scotia (Canada); Art. 521.12(2) Civil Code of Quebec (Canada) (the civil union is dissolved by marriage of the partners with each other; not by marriage with a third party).

[193] See under Part II B above.

[194] § 1(2) German Registered Partnership Law establishes the requirement of full age of the partners, which is 18 in Germany, see § 2 *Bürgerliches Gesetzbuch* (hereinafter German Civil Code).

[195] Art. 1475(2) Belgian Civil Code requiring the partners to have capacity to enter into contracts according to Arts 1123, 1124 Belgian Civil Code, for which they need majority (18 years – Art. 488 Belgian Civil Code).

[196] § 4(4) Czech Registered Partnership Law.

[197] Art. 515-1 in connection with Art. 388 French Civil Code.

[198] Art. 521.1 Civil Code of Quebec (Canada).

[199] Art. 3 (1) of the *Zakon o registraciji istospolne partnerske skupnosti (ZRIPS), 22 June 2005,* in *Uradni list Republike Slovenije, Nr. 65/2005,* (hereinafter Registered Partnership Law of Slovenia).

[200] See Book 1, Art. 80a(6) Dutch Civil Code in connection with Book 1, Art. 31 Dutch Civil Code.

[201] The Vital Statistics Act of Nova Scotia (Canada) forbids the registration of a domestic partnership by minors (see Section 53 (3)). The age of majority in this province is 19; see also Winifred Holland, *supra* footnote 171, p. 488.

[202] For England and Wales see Art. 3 UK Civil Partnership Act; for Scotland see Art. 86 UK Civil Partnership Act; for Northern Ireland see Art. 138 UK Civil Partnership Act.

[203] For England and Wales see Art. 4 UK Civil Partnership Act; for Northern Ireland see Art. 141 UK Civil Partnership Act. Parental consent is not needed in Scotland.

[204] See Art. 2(1) Partnership Law of the Basque Country (Spain); Art. 2(1) Partnership Law of Extremadura (Spain); Art. 2(1) Partnership Law of Madrid (Spain).

[205] See Book 1, Art. 80a(6) Dutch Civil Code in connection with Book 1, Art. 31 Dutch Civil Code.

reached the age of 16.[206] An exception to the age limit is not allowed, however, in Switzerland where, as indeed for marriage, there is no exception to the requirement of full age.[207] Belgium[208] and France,[209] for their part, allow such exceptions with respect to marriage but have elected not to apply them to registered partnerships, thereby making legal cohabitation and the Pacs more difficult to enter into than marriage.

d) Minimum duration of cohabitation

90. A limited number of jurisdictions require the parties to have cohabited for a certain duration before their union or partnership may be registered. This is the case, *inter alia*, for the Autonomous City of Buenos Aires (Argentina) which requires the partners to have maintained a stable and public emotional relationship for a minimum duration of two years.[210] This requirement is not needed, if the partners have a child together. Certain Spanish autonomous communities, such as the autonomous communities of Cantabria, Extremadura, Madrid and Valencia have similar rules, although requiring only a minimum cohabitation of 12 month.[211]

e) Consent

91. In all legal systems that have legislated on registered partnership both partners are required to "be *compos mentis"*, to have "legal capacity", or the "capacity to enter into contracts".[212] Therefore an adult subject to curatorship cannot enter into a partnership without special permission. Many jurisdictions, such as the Netherlands,[213] provide rules regulating those cases. As set forth above a minor may in certain jurisdictions also register a partnership with his or her parents' or court permission.[214]

f) Formal requirements

92. As concerns formal requirements, the domestic legislations differ but nevertheless usually retain a similar orientation.

93. The authority competent to register partnerships is, in several cases, the authority empowered to perform a marriage ceremony. This is the case, for instance, in Finland[215] and in Quebec[216] (Canada).

94. In contrast France has created a system of registration of Pacs in parallel to that for marriages, choosing to entrust registration of a Pacs to the Court Registrar[217] rather than to the mayor / registration officer. The French legislature has sought to distinguish this new institution from marriage. In Sweden, it is specified that the registration may be carried out by a legally trained judge of a district court or by a person appointed by the county's administrative committee.[218] In similar fashion, Iceland requires the registration to be carried out by a judge or an assistant having received legal training.[219] It is

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[206] *Ibid*.
[207] See Art. 94 *Code civil suisse du 10 décembre* 1907 (Swiss Civil Code). The age of majority in Switzerland was lowered from 20 to 18 only in 1996, see Ian Curry-Sumner, *All's well that ends registered?*, *supra* footnote 22, p. 168.
[208] Ian Curry-Sumner, *All's well that ends registered?*, *supra* footnote 22, p. 43.
[209] *Ibid*., p. 83.
[210] Art. 1 b) Civil Union Law of the Autonomous City of Buenos Aires (Argentina).
[211] See, Art. 4(3)a) Partnership Law of Cantabria (Spain); Art. 2(2) Partnership Law of Extremadura (Spain); Art. 1(1) Partnership Law of Madrid (Spain); Art. 1(1) Partnership Law of Valencia (Spain).
[212] See, for instance, Art. 1475(2) Belgian Civil Code and Art. 515-1 French Civil Code.
[213] See Book 1, Art. 80a(6) Dutch Civil Code in connection with Book 1, Arts 37 and 38 Dutch Civil Code.
[214] See above Part II, C, 1, c).
[215] § 4(1) Finnish Registered Partnership Law.
[216] Art. 521.2 Civil Code of Quebec (Canada).
[217] This register maintains the register establishing the Pacs although after the reform of the Pacs law an additional mentioning of the Pacs has be made in the birth register of each partner in order to secure public notice.
[218] Chapter 1, § 8 Swedish Registered Partnership Law.
[219] Art. 4 Icelandic Registered Partnership Law.

specified in some legal systems, however, such as in Quebec (Canada),[220] that no minister of religion may be compelled to solemnise a civil union to which there is an impediment under his or her religion and the discipline of the religious community to which he or she belongs.

95. All the Spanish autonomous communities that have introduced a system of registered partnership,[221] created a separate registry for partnerships.[222]

96. The partners are usually also required to make a declaration that is registered, personally and jointly.[223] Certain jurisdictions, however, have not expressly regulated such a requirement.[224] In Germany, the partners are required to declare mutually, personally and in each other's presence their intent to enter into a partnership.[225]

97. In France, the procedure for establishment of a partnership consists of the following steps.[226] The parties conclude a contract, which may be either drafted privately or as an authentic instrument before a notary.[227] With this contract, the parties make a joint declaration at the registry of the court of first instance within the jurisdiction of their common residence. The court registrar checks that the declaration is admissible and enters it in the register of Pacs. In addition the Pacs has to be marked in the birth registers of each of the partners.[228]

98. In Belgium, the partners make a declaration by means of an instrument in writing delivered against a receipt to the officer for the area in which they have their common residence. This instrument, which is required to contain a number of standardised items of information, is registered by the registration officer in the population register.[229] In similar fashion, in the Netherlands, the partners have to deliver an official declaration to the registration officer of the residence of one of the partners and produce the documents evidencing that they satisfy the requirements. One special feature of the Dutch system is that, due to the analogous application of the rules on marriage, the registration may not occur before expiry of a period of two weeks from the date of registration of the declaration instrument.[230] In the Nordic countries, the registration corresponds to a ceremony of marriage.[231]

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[220] Art. 521.2(2) Civil Code of Quebec (Canada).

[221] Registered partnerships as defined in this Note have been introduced in the Spanish autonomous communities of the Balearic Islands, the Basque Country, Cantabria, Extremadura, Madrid and Valencia. In Galicia, the civil law has recently been amended in order to grant registered couples the same rights as married couples (*Ley 10/2007, de 28.06.2007, de reforma de la disposición adicional tercera de la Ley 2/2006, de 14.06.2006, de derecho civil de Galicia*) and in December 2007 the relevant register was created (*Decreto 248/2007, de 20.12.2007, por el que se rea y se regula el Registro de Parejas de Hecho de Galicia).* The law of the autonomous community of Catalonia on same-sex partnerships (Arts 19-35 Partnership Law of Catalonia (Spain)) has been dealt with under the category of unmarried cohabitation. However, this law shows that the division between unmarried cohabitation and registered partnerships can be somewhat artificial, if, although a registration is not required as a constituting element, compliance with strict formal requirements is needed in order to give any effect to a partnership. (See Art. 21 Partnership Law of Catalonia (Spain).)

[222] See, for example the *Registro de Parejas Estables de las Illes Baleares*, Art. 1(2) Partnership Law of the Balearic Islands (Spain) and the *Registro de Parejas de Hecho de la Comunidad Autónoma del País Vasco*, Art. 3(1) Partnership Law of the Basque Country (Spain). Some autonomous communities have specified that their registry is only meant to be of administrative and not of civil nature, see Cristina Gonzáles Beilfuss, "Spanien und Portugal", *supra* footnote 39, p. 256. However, in all of the community laws dealt with under the category of registered partnership, registration is a constituting element.

[223] See, *inter alia*, Chapter 1, § 7 Swedish Registered Partnership Law and § 5 Finnish Registered Partnership Law.

[224] Belgium for example; see Ian Curry-Sumner, *All's well that ends registered?*, *supra* footnote 22, p. 46.

[225] § 1(1) German Registered Partnership Law.

[226] See Arts 515-3 *et seq*. French Civil Code.

[227] The alternative of an authentic instrument has been introduced in connection with the reform of the Pacs provisions in June 2006.

[228] The necessity of mentioning the Pacs in the birth register has been introduced in connection with the reform of the Pacs provisions in June 2006.

[229] Art. 1476 (1) Belgian Civil Code.

[230] See Book 1, Art. 80a(6) in connection with Arts 44 to 49, 62 Dutch Civil Code.

[231] § 2 Danish Registered Partnership Law, § 2 Norwegian Registered Partnership Law; Chapter 1, §§ 6 to 9 Swedish Registered Partnership Law; Arts 3 and 4 Icelandic Registered Partnership Law; §§ 3 to 5 Finnish Registered Partnership Law.

99. In Iceland, a certificate confirming that a review relating to the requirements for a registered partnership has been conducted and that they are indeed satisfied is to be submitted prior to registration.[232]

100. Finally, many States require, as for marriage, the partnership to be registered in the presence of witnesses, the numbers of which vary from one State to another.[233]

2. Impediments

a) Prohibited degrees

101. Almost all the systems prohibit the registration of partnerships between relatives to a certain degree, which varies from one system to another. However, in some jurisdictions it is possible to register so-called "caring relationships" which are not based on a marriage-like cohabitation but rather on domestic support and personal care.[234] Since the function of caring relationships differs from that of other registered partnerships kinship is no impediment.[235] An example of a jurisdiction that allows the registration of a relationship between relatives is Belgium.[236] The different function of the registered partnership in the Belgian legal system is reflected in the legal term that was chosen for it: statutory cohabitation.

102. Elsewhere, the basic prohibition is usually that of ascendants / descendants in the direct line and of brothers and sisters (collaterals in the second degree).[237] Some systems, such as Quebec (Canada), simply ban the formation of a partnership between ascendants and descendants and between brothers and sisters.[238] The situation is the same in Switzerland[239] and the Netherlands,[240] where the Minister of Justice may, however, allow this requirement to be set aside if there is good cause to do so.[241]

103. Germany and Finland, for their part, have found it necessary to expressly to ban registration of a partnership between a half-brother and a half-sister.[242] The same is the case in Sweden – although there exists the possibility to override this ban with the Government's permission.[243]

104. The laws of the Spanish autonomous communities ban registration of a partnership between ascendants in the direct line, and between collaterals but at varying degrees. Certain Spanish autonomous communities ban partnerships between collaterals up to the second degree,[244] while others extend the ban to the third degree.[245]

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[232] Art. 3 Icelandic Registered Partnership Law.
[233] See, for instance, Chapter 1, § 6 Swedish Registered Partnership Law requiring two witnesses; Art. 521.2 Civil Code of Quebec (Canada), requiring two witnesses; Art. 3 Civil Union Law of the Autonomous City of Buenos Aires (Argentina), requiring a minimum of two and allowing a maximum of five witnesses.
[234] See Jens M. Scherpe, *supra* footnote 86, pp. 579, 582.
[235] See also Relationship Act of Tasmania (Australia), dealt with under the category of unmarried cohabitation, Part I, C, 2, a).
[236] See Ian Curry-Sumner, *All's well that ends registered?*, see *supra* footnote 22, pp. 44, 45; Walter Pintens, *supra* footnote 184, p. 286.
[237] For instance, in the Czech Republic, see § 4(3) Czech Registered Partnership Law.
[238] See Art. 521.1 Civil Code of Quebec (Canada).
[239] Art. 4(1) Swiss Registered Partnership Law.
[240] Book 1, Art. 80a(6) in connection with Book 1, Art. 41 Dutch Civil Code. The Minister of Justice may grant an exception for brothers and sisters, who are brother and sister simply due to adoption, see Book 1, Art. 41(2) Dutch Civil Code.
[241] *Ibid*.
[242] § 1(3) German Registered Partnership Law; § 2 Finnish Registered Partnership Law that refers to § 7(2) of the Finnish *Avioliittolaki (No 234/1929)* (hereinafter Finnish Marriage Law)).
[243] § 3(2) Swedish Registered Partnership Law.
[244] See Art. 2 Partnership Law of the Basque Country (Spain).
[245] See, *inter alia*, Art. 2 (1) Partnership Law of the Balearic Islands (Spain); Art. 3(1) e) Partnership Law of Estremadura (Spain); Art. 2(1)e) Partnership Law of Madrid (Spain); Art. 2(1)e) Partnership Law of Valencia (Spain).

105. France[246] and Andorra[247] ban registration of a partnership, in parallel to their rules on marriage, between ascendants and descendants in the direct line, between persons related by marriage in the direct line, and between collaterals up to the third degree.

106. The Autonomous City of Buenos Aires (Argentina) also prohibits registration of a civil union between ascendants-descendants by consanguinity in all degrees, and between persons related by marriage in the direct line in all degrees.[248] It bans registration between persons related by full adoption. In the case of a simple adoption, the ban applies between the adopting parent and adopted child, adopting parent and descendant or spouse of the adopted child, adopted child and spouse of the adopting parent, among adopted children of a single person, and between the adopted child and the adopting parent's child.[249]

107. Finally, the United Kingdom, for its part, specifies in the form of a comprehensive list the persons with whom registration of a partnership is absolutely prohibited. These are, for England, Wales and Northern Ireland, children (including adopted children and former adopted children) and parents; grandchildren and grandparents; uncles, aunts, nephews and nieces; and brothers and sisters including half-brothers and half-sisters.[250] Scotland adds to the list partnerships between great-grandparents and great-grandchildren.[251] Furthermore registration of a partnership is prohibited if the intended partner is the child of a former civil partner or spouse, the former civil partner or spouse of a parent or of a grandparent, and the grandchild of a former civil partner or spouse.[252] In England, Wales and Northern Ireland an exception is made from prohibition of relationships by affinity if both partners are aged 21 at the time of registration of the partnership and if the younger of the partners has not been at any time, before the age of 18, a child of the family in relation to the other.[253] "A child of the family in relation to another person" means a person who has lived in the same household as that other or has been treated by that other person as a child of his family.[254]

b) Undissolved marriage or registered partnership

108. This ban overlaps with the requirement of exclusivity considered and described above in Part II, C, 1, a). Indeed, in all jurisdictions, being married or being registered as a partner is an impediment for a new registered partnership with a third party.

D – Legal effects of the partnership

109. The registered-partnership systems are distinguished from one another, and frequently from marriage and mere *de facto* cohabitation or union, by the legal effects they produce. Once again, the purpose of this review is not to name and describe them comprehensively, but to outline the most common effects resulting from the majority of registered partnerships.

1. Property rights

110. Regardless of name, extent or scope of the legislation with respect to registered partnerships, all systems of registered partnership give the partnership at least, and even if nothing else, certain effects in regard to property rights.

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[246] Art. 515-1 French Civil Code.
[247] Art. 2 (1) Registered Partnership Law of Andorra.
[248] Art. 5 b) Civil Union Law of the Autonomous City of Buenos Aires (Argentina).
[249] Art. 5 c) Civil Union Law of the Autonomous City of Buenos Aires (Argentina).
[250] See Schedule 1, 1 (for England and Wales) and Schedule 12 (for Northern Ireland) of the UK Civil Partnership Act 2004.
[251] *Ibid.,* Schedule 10.
[252] *Ibid.*, Schedule 1, Schedule 12 and Schedule 10.
[253] *Ibid.,* Schedule 1, 2 (1) and Schedule 12, 2 (1); for further exceptions see Schedules 1, 2 (3) and 12, 2 (3).
[254] *Ibid.,* Schedule 1, 2 (2) and Schedule 12, 2, (2).

111. Certain laws, such as the registered partnership laws of the Spanish autonomous communities, allow partners to determine the effects as to property rights of their unions.[255] Some allow a choice of the form of such an agreement by requiring either a private or public instrument.[256] In the absence of agreement, the partners are subject to the generally-applicable rules. This is also the case of Andorra, where the legislation requires the partners to provide by private agreement for the effects, both personal and in regard to property rights, but the legislation imposes certain minimum obligations which the agreement must contain.[257] The situation in Luxemburg is similar.[258]

112. As regards the statutory regime, several jurisdictions make the partnership subject to the property regime of joint ownership of property acquired during marriage, such as Quebec (Canada)[259] or a community property regime, as in the Netherlands.[260] Certain States, such as Switzerland[261] and France,[262] have instead elected to make the partners subject to a regime corresponding to that of separate estates, thereby making a distinction from the *ex lege* matrimonial regime. In Germany, following a change of the German Partnership Law in 2005, the *ex lege* matrimonial property regime for marriages was introduced as the *ex lege* regime for registered partnerships.[263]

2. Rights with respect to financial matters (taxation, welfare and pensions)

113. Even though the benefits vary from one State to another, registered partners are usually granted preferential fiscal treatment. Certain States treat registered partners the same or almost the same as spouses with respect to tax and welfare. This is the case in the Netherlands.[264] In France, the partners are entitled to the same treatment as spouses with respect to financial matters.[265] Other benefits are also extended to the registered partners in France, such as in the areas of health and maternity insurance as well as in the labour law.[266] In Belgium, even though statutory cohabitants were initially treated like *de facto* unmarried spouses, this has been recently amended. Since 2005 statutory cohabitants have been treated equally with spouses as regards financial matters.[267]

3. Family rights with respect to the relationship between partners

114. The extent of the family rights arising from the personal relationship between registered partners varies considerably from one legal system to another. Some confer on them rights similar to those of spouses. Others, however, have chosen to restrict the scope of those personal rights and to grant rights almost only in regard to property rights. The latter is usually the case of jurisdictions having opted for a "weak" form of registered partnership. This is the case in France, Belgium and Luxembourg, for instance.

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[255] See, Art. 4 Partnership Law of the Balearic Islands (Spain); Arts 5 and 6 Partnership Law of the Basque Country (Spain); Art. 8 Partnership Law of Cantabria (Spain); Art. 6 Partnership Law of Extremadura (Spain); Art. 4 Partnership Law of Madrid (Spain) and Art. 4 Partnership Law of Valencia (Spain).
[256] Art. 5 (1) Partnership Law of the Basque Country (Spain).
[257] Art. 5 Registered Partnership Law of Andorra.
[258] Art. 6 Luxemburg Registered Partnership Law.
[259] Art. 521.8 (2) Civil Code of Quebec (Canada).
[260] Book 1, Art. 80b in connection with Book 1, Art. 93 of the Dutch Civil Code.
[261] A departure by means of a notarial deed is however permitted. The partners are accordingly allowed to opt in the event of dissolution of their partnership to have their property separated according to the regime governing the joint ownership of aquired property. See in detail Art. 25 Swiss Registered Partnership Law. See also Heinz Hausheer, "Die eingetragene Partnerschaft in der Schweiz", in *FamRZ* 2006, pp. 246, 248.
[262] The *ex lege* property regime for Pacs was changed to separation of assets by the reform of the Pacs law, see new Art. 515-5 French Civil Code. The parties may, however, chose the system of undivided interests, see Art. 515-5-1 French Civil Code.
[263] See § 6 German Registered Partnership Law. The *ex lege* property regime is "Zugewinngemeinschaft" (joint ownership of the increase in capital value of assets).
[264] See Katharina Boele-Woelki / Wendy Schrama, *Die nichteheliche Lebensgemeinschaft im niederländischen Recht*, *supra* footnote 9, pp. 352 *et seq*.
[265] See Art. 6(1) of the French *Code général des impôts* (General Taxation Code), as last amended by *Loi No 2004-1484, 30.12.2004*.
[266] See Frédérique Ferrand, *Die Rechtsstellung nichtehelicher Lebensgemeinschaften in Frankreich*, *supra* footnote 57, pp. 239, 240; see also Ian Curry-Sumner, *All's well that ends registered?*, *supra* footnote 22, p. 94.
[267] See Ian Curry-Sumner, *All's well that ends registered?*, see *supra* footnote 22, pp. 51-53, 63, 64.

In certain legal systems, such as in several Spanish autonomous communities, the partners are permitted to determine the personal effects of their unions.[268]

a) Obligations and duties of partners

(i) Cohabitation obligation

115. The cohabitation obligation is fairly common among legal systems within which registered partnership exists. This is the case in Quebec (Canada),[269] *inter alia*, which describes a civil union as a commitment by two persons to live in common. A duty to cohabit has also been introduced in France with the reform of the Pacs law in 2006.[270] The registered partnership law in many other countries regard cohabitation as a matter of course for registration of a partnership by stating that two partners cohabiting may register their partnership.[271] The requirement of cohabitation is also implied in the legal systems that require a minimum period of cohabitation before registration, such as Cantabria (Spain) or Extremadura (Spain).[272] In other States, such as Germany, the law does not require the partners to cohabit.

(ii) Obligation of faithfulness

116. As regards the obligation of faithfulness, well known from matrimonial law, different positions can be distinguished. First, there are legal systems which require it, such as Quebec[273] (Canada) and the Netherlands,[274] and legal systems which do not mention it, such as the Spanish autonomous communities, France, and Luxemburg. France provides instead that the partners are bound by a duty of honesty, as in the performance of any contract.

(iii) Support and assistance obligation and obligation to contribute to household expenses

117. Most legal systems impose on registered partners an obligation of mutual support and assistance. This is the case, *inter alia*, in Germany,[275] Quebec (Canada),[276] Luxemburg[277] and Switzerland[278]. In France, it has been provided that assistance between partners is mutual and material on the terms set in the Pacs.[279]

118. Several legal systems require the partners to contribute to household expenses in proportion to their respective abilities. This is the case in Belgium,[280] Quebec (Canada),[281] the Netherlands and Switzerland[282] and also in the Spanish autonomous communities of the Balearic Islands,[283] Extremadura[284] and Madrid[285].

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[268] See, for instance, Art. 4(1) Partnership Law of the Balearic Islands.
[269] Art. 521.1 Civil Code of Quebec (Canada).
[270] See Art. 515-4 French Code Civil.
[271] See, for instance, Art. 1(1) Partnership Law of the Balearic Islands (Spain).
[272] See above Part II, C, 1, d).
[273] Art. 521.6(2) Civil Code of Quebec (Canada).
[274] Book 1, Art. 80b Dutch Civil Code in connection with Book1, Art. 81 Dutch Civil Code.
[275] See § 2 German Registered Partnership Law.
[276] Art. 521.6(2) Civil Code of Quebec (Canada).
[277] Art. 7(1) Luxemburg Registered Partnership Law.
[278] Art. 12 Swiss Registered Partnership Law.
[279] Art. 515.4 French Civil Code; the express duty for "assistance" was added in the course of the reform of the Pacs law to give the Pacs a new dimension by creating personal duties between the partners.
[280] Art. 1477(3) Belgian Civil Code.
[281] Art. 521.6 in connection with Art. 396 Civil Code of Quebec (Canada).
[282] Art. 13(1) Swiss Registered Partnership Law.
[283] Art. 5 Partnership Law of the Balearic Islands (Spain).
[284] If not otherwise determined by contract, see Ulrich Daum, *supra* footnote 94, p. 98.
[285] If not otherwise determined by contract, see Art. 4 Partnership Law of Madrid (Spain), see also Ulrich Daum, *supra* footnote 94, p. 138.

(iv) Duty to repay debts

119. Several legal systems, such as France, Quebec (Canada), Luxemburg and Belgium also provide for the joint responsibility for all debts assumed for the purposes of living in common, including in particular the expenses connected with the common residence.[286] However, this obligation usually excludes debts that are excessive in relation to the partners' resources[287] or way of life and debts where one partner had previously informed the contracting third party of his / her wish not to be bound.[288]

(v) Protection of the family home

120. Many of the systems contain provisions relating to protection of the family home and movables similar or identical to those applicable to spouses. This is the case in Switzerland[289] and Belgium,[290] where one partner may not dispose, without the other's consent, of the realty serving as the common home. Neither may it be mortgaged without the other's consent. The Belgian law in addition provides that the partner may not dispose gratuitously or for value of the movables belonging to the family home, or pledge it without the consent of the other.[291] The courts may set this absence of consent by the cohabitant aside if there are no serious grounds for refusal, and thereby permit the other legal cohabitant to act alone.[292] The same principle applies when the cohabitant is absent, subject to a prohibition or unable to express his or her intent. In Germany, a court may award use of the family home leased by one or both partners to one of them. If the family home is owned or jointly owned by one of the partners, the court may also provide for its leasing to the other.[293]

b) Entitlement to maintenance

121. Certain legislations provide for an option, upon dissolution of a partnership, for the grant of maintenance to a partner.[294] Less frequently, one can also find provisions on maintenance upon separation of the partners before a possible dissolution of the partnership.[295] Usually, and as in matrimonial cases, maintenance is awarded having regard to the claimant's needs and the defendant's resources.

122. In Luxemburg, a justice of the peace may award maintenance to a partner pursuant to dissolution of the partnership only on an exceptional basis.[296] In Belgium and France, however, the partners or cohabitants are not entitled to maintenance upon dissolution of their partnership, regardless of its duration.[297] As a general rule, it can be observed that States having a strong form of registered partnership grant the option for registered partners to obtain maintenance subject to requirements similar to those for spouses. Those States having adopted a weak form of registered partnership, for their part, rule out or restrict partners' rights to claim maintenance.

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[286] See for instance, Art. 515.4 French Civil Code; Art. 521.6 in connection with Art. 397 Civil Code of Quebec (Canada); Art. 7(2) Luxemburg Registered Partnership Law and Art. 1477(4) Belgian Civil Code.
[287] Art. 1477(4) Belgian Civil Code and Art. 515.4 French Civil Code.
[288] Arts 521.6 and 397 Civil Code of Quebec (Canada).
[289] See Art. 14 Swiss Registered Partnership Law.
[290] Art. 1477(2) in connection with Art. 215 Belgian Civil Code.
[291] *Ibid*.
[292] Art. 1477(2) in connection with Art. 220 Belgian Civil Code.
[293] § 18 German Registered Partnership Law.
[294] See for instance, Book 1, Arts 80d and 80e Dutch Civil Code; § 16 German Registered Partnership Law.
[295] See for examples § 12 German Registered Partnership Law or § 10 Czech Registered Partnership Law.
[296] Art. 12(2) Luxemburg Registered Partnership Law.
[297] See Ian Curry-Sumner, *All's well that ends registered?*, *supra* footnote 22, pp. 71 and 115.

c) Name

123. In Germany, partners are allowed to choose the birth name of one of them as a common surname.[298] A partner may also choose to have his or her birth name precede or added to that common name, which may be subject to a non-recurring revocation.[299] In Belgium and France, however, legal cohabitation and the Pacs have no particular effects on the cohabitants' names.[300] In the Netherlands neither a marriage nor a registered partnership necessarily brings a change in the surname of the parties. But the partners of a registered partnership gain as through marriage the right and competency to use each others surnames.[301]

d) Inheritance

124. As regards the law of succession, certain jurisdictions, such as Switzerland, treat registered partners in the same way as spouses and confer the same status on them. Also in the Czech Republic a partner inherits from his deceased partner intestate as a spouse would.[302] Similarly in Germany, the inheritance rules for registered partners are modelled on the example of spousal succession law.[303] In Belgium and France, however, the surviving partner is allowed to inherit from his or her partner only by will. In relation to the heirs with a statutory entitlement in Belgium, the assets subject to undivided interests are deemed to be conveyed to the surviving partner as a gift, subject to proof to the contrary.[304] In France, the partners may also make donations to each other during their lives.[305]

125. Due to a lack of legislative competence in this field, several Spanish autonomous communities, such that of Extremadura, Madrid and Valencia do not provide for any rules in regard to succession in their registered partnership laws.[306] Other Spanish autonomous communities provide the surviving registered partner with certain family law based rights to furniture and household contents and allow him / her to remain in the common housing for the subsequent year.[307]

e) Other effects

126. One specific feature of the German system is that relating to the family relationships created by the partnership:[308] as a result of the registration, each of the partners is deemed to be a member of the other partner's family, and the law establishes a legal relationship between one partner's relatives and the other partner. In Quebec (Canada), a civil union also creates a family connection between each partner and the other partner's relatives.[309] In many other legal systems, such as France[310] and in the Spanish autonomous communities,[311] on the contrary, the registered partnership creates no family relationship.

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[298] § 3(1) German Registered Partnership Law.
[299] § 3(2) German Registered Partnership Law.
[300] See Ian Curry-Sumner, *All's well that ends registered?*, *supra* footnote 22, pp. 49, 50 and 92, 93.
[301] *Ibid*., p. 129.
[302] See Milana Hrušáková, *supra* footnote 167, p. 1338.
[303] See § 10 German Registered Partnership Law and § 1931 BGB (German Civil Code).
[304] Art. 1478(3) Belgian Civil Code.
[305] There may, however, be restrictions on donations in connection with Arts 912 *et seq*. and 918 *et seq*. of the French Code Civil; see also Ian Curry-Sumner, *All's well that ends registered?*, *supra* footnote 22, p. 103.
[306] See Cristina Gonzáles Beilfuss, "Spanien und Portugal", *supra* footnote 39, pp. 268, 269.
[307] *Ibid.* See Art. 12 Partnership Law of the Balearic Islands; Art. 6(2) Partnership Law of the Basque Country.
[308] § 11 German Registered Partnership Law.
[309] Art. 521.7 Civil Code of Quebec (Canada).
[310] See Frédérique Ferrand, *Die Rechtsstellung nichtehelicher Lebensgemeinschaften in Frankreich*, *supra* footnote 57, p. 224.
[311] Art. 3 Partnership Law of the Balearic Islands (Spain) expressly sets forth that registered partnership creates no family relation. Other autonomous communities do not mention this aspect, most of them due to lack of legislative competency in this field, see Cristina Gonzáles Beilfuss, "Spanien und Portugal", *supra* footnote 39, p. 260.

4. Family rights relating to children

127. As set forth above,[312] the establishment of a parent-child relationship (filiation) between a child and the mother's unmarried partner is more difficult than for married couples. Many States have elected not to extend application of the rules of how to establish paternity applicable for married couples to registered partners. In particular the issue of establishing a parent-child relationship between the child and two parents of the same sex has given rise to extensive controversy in many jurisdictions.

128. The presumption of paternity according to which a husband is considered the father of a child born during his marriage or within a certain period after its dissolution, is in some legal systems also applicable to registered partnerships, although it is mostly restricted to different-sex partnerships. This is, for instance, the case in Quebec (Canada). If a child is born during (or within 300 days after the dissolution of) a civil union between partners of different sex, the partner of the child's mother is presumed to be the father.[313]

129. In the Netherlands, the presumption of paternity has not been extended to registered partnerships, whether different-sex nor same-sex. However, in a different-sex registered partnership, a man can recognise paternity of a child born to his registered partner. For same-sex registered partnerships this possibility does not exist; a woman cannot recognise maternity of a child born to her registered partner.[314]

a) Adoption

130. Child adoption and artificial insemination are in many jurisdictions only available for married couples. Gradually, certain legal systems have also allowed single people and unmarried partners to adopt or have access to assisted reproduction.

131. In most legal systems which have the institution of registered partnership, and in particular those reserved for same-sex couples, the adoption of children, and likewise recourse to medically assisted reproduction, considered under the following section, were expressly ruled out at the outset.

132. Despite the initial restrictive approaches, the situation is beginning to change and certain States now allow the adoption of children by same-sex partners.[315] The adoption of one partner's children by the other partner (stepchild adoption), though impossible initially in most jurisdictions, is permitted now in several States such as Denmark,[316] Iceland,[317] Norway[318] and Germany[319]. Although Danish and Icelandic law specify that the partner's child may be adopted only if not previously adopted from a foreign country by his or her parent. The adoption of a child other than a stepchild by both partners is still ruled out in all the jurisdictions mentioned. However, this is not the case in Sweden, where same-sex registered partners have since 2003 been allowed to jointly adopt children that are not children of one of the partners.[320] In the Netherlands the adoption of a child by same-sex partners is possible, whether their relationship is registered or not.[321]

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[312] See Part I, C, 4.
[313] See Art. 525 Civil Code of Quebec (Canada).
[314] See Katharina Boele-Woelki / Wendy Schrama, *Die nichteheliche Lebensgemeinschaft im niederländischen Recht*, *supra* footnote 9, pp. 321, 322.
[315] Nina Dethloff, *Same-Sex Parents in a Comparative Perspective*, *supra* footnote 156, pp. 195, 204, 205.
[316] § 4(1) Danish Registered Partnership Law.
[317] Art. 6(1) Icelandic Registered Partnership Law.
[318] § 4 Norwegian Registered Partnership Law.
[319] § 9(7) German Registered Partnership Law.
[320] See Chapter 3, § 2 of the Swedish Law *(Lag om Homosexuella Sambor (1994 :1117))* was abrogated by the Law (2005:477) in effect since 1.2.2003; see also Gebhard Carsten in Bergmann / Ferid / Henrich, *Internationales Ehe- und Kindschaftsrecht, Schweden*, 164. Supplement, December 2005, p. 34; Nina Dethloff, *supra* footnote 156, p. 197.
[321] See Book 1, Art. 227 Dutch Civil Code; see also Katharina Boele-Woelki / Wendy Schrama, *Die nichteheliche Lebensgemeinschaft im niederländischen Recht*, *supra* footnote 9, p. 323.

133. The Spanish communities of the Basque Country[322] and Cantabria[323] grant different-sex and same-sex registered couples the right to adopt children both adoption of one partner's child and a child who is not the child of either partner. Similarly in Quebec (Canada), where the legislature has chosen to break with the former rules and opened up to same-sex couples the adoption of the partner's child as well as national or international adoption of a child by both partners.[324]

134. However, adoption by same-sex partners remains prohibited in certain States, such as Switzerland.[325] It should be noted nevertheless that, in the case of Switzerland specifically, though the partner of the children's parent may not adopt them, he or she is nevertheless bound by a duty of assistance to his or her partner in the latter's obligations of maintenance, with respect to parental responsibility and to representation.[326]

b) Assisted reproduction

135. As stated above,[327] certain legal systems make artificial insemination available to unmarried couples and some[328] even to single women. Although female registered partner may therefore have access to assisted procreation in several jurisdictions, it is without prejudice as to how her partner may establish a parent-child relationship. As set forth few jurisdictions are extending the marital presumption of paternity to registered partnerships especially not to same-sex registered partnerships.

136. Quebec (Canada) is one of the rare exceptions. If a child is born of a so-called "parental project" involving assisted reproduction between partners of a civil union the partner of the woman who gave birth to the child during the civil union or within 300 days after its dissolution is considered to be the other parent of the child.[329] *De facto* partners do not enjoy the benefit of this presumption, however, as explained in Part I of this Note. In no event may the third party who has provided genetic material for an assisted procreation claim a right of parenthood. The situation is different when the contribution of genetic material occurs through sexual intercourse between a third party and a female civil union partner. In such case, the maternity of the woman who has borne the child is easy to establish[330] but the contributor will be allowed a period of one year after the child's birth during which he may claim paternity, thereby preventing the partner of the child's mother from also becoming the father or a co-mother.[331]

137. Some jurisdictions, such as Iceland,[332] have expressly excluded the rules of domestic law relating to artificial insemination from the scope of the legislation relating to registered partnerships.

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[322] Art. 8 Partnership Law of the Basque Country (Spain). The relevant provision was subject of a political controversy. On request of the Spanish Prime Minister the Spanish Constitutional Court ordered in December 2003 the provisional stay in application of the relevant adoption provision, *inter alia* on the grounds that the autonomous community did not have the legal competency to legislate on the issue. After the withdrawal of the application by the Attorney General, the Spanish Constitutional Court abandoned the proceedings; see Ulrich Daum, *supra* footnote 94, p. 94, at note 2.
[323] Art. 11 Partnership Law of Cantabria (Spain).
[324] See Art. 546 Civil Code of Quebec (Canada).
[325] Art. 28 Swiss Registered Partnership Law.
[326] *Idem*, Art. 27 (1).
[327] See Part I, C, 4, b).
[328] This is the case in Spain, where every women, who has reached the age of majority has access to artificial insemination, see Cristina Gonzáles Beilfuss, "Spanien und Portugal", *supra* footnote 39, p. 267. For Quebec (Canada) see Art. 538 Civil Code of Quebec (Canada), according to which a so-called "parental project" with assistance for reproduction is defined as recourse by a single person or partners, in order to have a child, to the genetic material of a person not being a party to the parental project.
[329] Art. 538.3 Civil Code of Quebec (Canada).
[330] The woman having borne a child is considered the mother of the child, see Art. 538.1 Civil Code of Quebec, which states that "*filiation of a child born of assisted procreation is established by the act of birth*". Additionally the Quebec law states that any agreement by a woman to procreate or carry a child on behalf of another is null and void in all cases, Art. 541 Civil Code of Quebec (Canada).
[331] Art. 538.2 Civil Code of Quebec (Canada).
[332] Art. 6(1) Icelandic Registered Partnership Law.

c) Parental responsibility / authority

138. In Switzerland, if one of the partners has children from a previous union, regardless of its characterisation, the other partner, though he or she may not adopt the children, is nevertheless bound to assist his or her partner, the children's parent in law, in a suitable manner in the performance of his or her maintenance obligations and in the exercise of parental authority, and to represent him or her when the need arises.[333]

139. In Germany, when one partner has sole custody of his or her child, he or she may grant his or her partner a right of joint decision with respect to matters concerning the child's everyday life.[334] In the event of a clear and present danger, the partner is entitled to make the legal decisions required for the child's well-being. He or she, however, is required to inform the parent having custody immediately.[335]

140. In Belgium, France and Slovenia and in all States which have opted for a weak form of registered partnership, however, the partnership has no specific effects on parental authority.

E – Dissolution of the partnership

141. A registered partnership, like a marriage, is dissolved by death. There are several approaches as regards dissolution *inter vivos*. First, there are systems where the dissolution of a registered partnership *inter vivos* is only possible by judicial proceedings. This is the case, for instance, in the United Kingdom,[336] in Switzerland,[337] in Germany[338] and in Vermont (USA)[339]. Also Sweden and Iceland, which apply *mutatis mutandis* to registered partnerships the rules for dissolution applicable to marriage,[340] require judicial proceedings for the termination of a registered partnership.[341]

142. There are also States where, as in matrimonial cases, recourse to authorities, either administrative or judicial, is allowed for dissolution of the partnership. This is the case, for instance, in Denmark and Norway where, as in matrimonial cases, the partners may obtain a dissolution of the registered partnership – depending on the circumstances - either by a court ruling or by a decision of the county Governor.[342]

143. There are legal systems where, in addition to the judicial method of dissolution available with respect to marriage, alternative methods are also available exclusively for dissolution of a registered partnership. In Quebec (Canada), dissolution of a civil union may be obtained by a court ruling, as in matrimonial cases, but also through a notarised joint declaration when the partners' intention to live in common is "irretrievably undermined".[343] Accordingly, partners may agree, in a joint declaration, upon dissolution of their union provided that they determine all its consequences by agreement. The declaration and agreement must be executed before a notary and an original copy retained in the notarial records ("recorded in notarial acts

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[333] Art. 27(1) Swiss Registered Partnership Law.
[334] § 9(1) German Registered Partnership Law.
[335] § 9(2) German Partnership Partnership Law.
[336] See Sections 37 *et seq.* (England and Wales), Sections 117 *et seq.* (Scotland) and Sections 161 *et seq.* (Northern Ireland) of the UK Civil Partnership Act.
[337] Arts 29, 30 Swiss Registered Partnership Law.
[338] § 15 German Registered Partnership Law.
[339] Art. 1206 Civil Union Act of Vermont (USA).
[340] Chapter 2, § 1 Swedish Registered Partnership Law and Art. 8 Icelandic Registered Partnership Law.
[341] The provisions on divorce, which are accordingly applicable to registered partnership in Sweden are regulated in Chapter 5, §§ 1 to 6 of the Swedish Marriage Act (*Äktenskasbalken (1987:230), 14.05.1987*); Art. 5 of the Icelandic Act No 31 of 14 April 1993 on marriage.
[342] § 5 Danish Registered Partnership Law in connection with § 42 of the Danish *Ægtekabslov, Lov Nr. 256, 4.6.1969*, as last amended in 2003 (hereinafter Danish Marriage Act); § 3 Norwegian Registered Partnership Act in connection with § 27 of the *Lov om ekteskab, Lov nr 47, 04.07.1991* (hereinafter Norwegian Marriage Act).
[343] Art. 521.12 Civil Code of Quebec (Canada).

en minute").[344] After filing with the notary, the notarial declaration will be notified, *inter alia*, to the Registrar of civil status.[345] In the Netherlands, dissolution is carried out either by a court ruling upon the application of one of the parties,[346] or by joint declaration, signed by both parties and at least one lawyer or notary, and entry into the registry.[347] That declaration must contain the parties' statement to the effect that the partnership has been irreparably broken and that they wish to put an end to it. Finally, the agreement must provide for the payment of maintenance, the use, whether permanent or not, of the family home, the apportionment of property and the interests in rights relating to pensions.[348]

144. In other States, such as Andorra,[349] France[350] and Belgium[351] and Nova Scotia (Canada),[352] the dissolution of a registered partnership is not effected by judicial proceedings, and alternative methods of dissolution are used. For instance, in Andorra, a registered partnership can be dissolved by agreement or by service of a unilateral declaration. It can also be dissolved by the marriage of one of the partners with a third party.[353] The situation is similar in the Spanish autonomous communities of the Balearic Islands,[354] the Basque Country,[355] Cantabria,[356] Extremadura,[357] Madrid[358] and Valencia[359]. Also in France, a joint declaration by the partners or the unilateral intent of one partner may put an end to a Pacs as well as the marriage of one of the partners. If the Pacs is terminated by mutual agreement, this has to be done by means of a joint declaration in writing made to the registrar of the court of first instance where the Pacs was registered, or to the competent diplomatic or consular agents.[360] The dissolution of the Pacs has effect *inter partes* immediately after the entry of the dissolution into the Pacs registry. With respect to third persons the dissolution only has effect after the fulfilment of the publicity requirements.[361] Further jurisdictions that provide for an automatic dissolution of a registered partnership, if one of the partners enters into a marriage with a third party are, for instance, Belgium, Luxemburg and Nova Scotia (Canada).[362]

145. The logic underlying these differences in approach seems to be that countries which have provided for a partnership reserved for same-sex couples and wishing to create an equivalent to the institution of marriage, tend to refer to the rules applicable to marriage and to depart from them only when this is required for a specific reason, thereby providing for similar treatment and effects. However, those States which have created a partnership for both same-sex and different-sex couples, aiming rather to provide a less demanding alternative to marriage, tend to provide for a more convenient form of dissolution in addition to the usual form of divorce, applied for either jointly or unilaterally.

146. Annulment of a registered partnership is usually subject to criteria and conditions equivalent to those with respect to the annulment of marriage.

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[344] Art. 521.13(1) and (2) Civil Code of Quebec (Canada).
[345] Art. 521.16(2) Civil Code of Quebec (Canada).
[346] Book 1, Art. 80c(d) and Art. 80e Dutch Civil Code.
[347] Book 1, Art. 80c(c) and Art. 80d Dutch Civil Code.
[348] Book 1, Art. 80d Dutch Civil Code.
[349] Art. 17 Registered Partnership Law of Andorra.
[350] Art. 515-7 French Civil Code.
[351] Art. 1476(2) Belgian Civil Code.
[352] Section 55c) Vital Statistics Act of Nova Scotia (Canada).
[353] Art. 17 Registered Partnership Law of Andorra.
[354] Art. 8 Partnership Law of the Balearic Islands (Spain).
[355] Art. 18 Partnership Law of the Basque Country (Spain).
[356] Art. 12 Partnership Law of Cantabria (Spain).
[357] Art. 5 Partnership Law of Extremadura (Spain).
[358] Art. 6 Partnership Law of Madrid (Spain).
[359] Art. 6 Partnership Law of Valencia (Spain).
[360] See for details Art. 515-7 French Civil Code.
[361] Art. 515-7(8) French Civil Code.
[362] See Art. 1476(2) Belgian Civil Code; Art. 13(1) Luxemburg Registered Partnership Law; Section 55c) Vital Statistics Act of Nova Scotia (Canada).

PART III – SUMMARY REVIEW OF RECENT DEVELOPMENTS WITH RESPECT TO SAME-SEX MARRIAGE

147. Even though this Note is intended mainly to sum up recent developments with respect to unmarried cohabitation, including registered partnership, an aside should be provided to summarise very briefly the recent domestic developments with respect to same-sex marriage.

148. Such marriages are now permitted in the Netherlands, Belgium, Canada, Spain and South Africa[363]. They are also permitted in Massachusetts (USA). Various other legal systems have chosen, on the contrary, to clarify that the term marriage in their legal systems is meant to only refer to a union of a different-sex couple.[364]

149. The Netherlands was the first country in the world to allow a civil marriage of same-sex couples. The law making marriage available to same-sex couples,[365] amending Book 1 of the Dutch Civil Code, modified the traditional definition of marriage in Article 30 so as to include same-sex couples. The effects of marriage are accordingly applicable to same-sex couples with the exception of certain rights with respect to the establishment of a parent-child relationship and international adoption.

150. Belgium, which had initially set up a system of legal cohabitation, followed its Dutch neighbour's lead by subsequently making the institution of marriage available to same-sex couples[366] while instituting nonetheless the same exceptions with respect to the establishment of a parent-child relationship and adoption.

151. In 2005, Canada passed the Civil Marriage Act,[367] a federal law that extends the legal capacity to marry for civil purposes to same-sex couples throughout the Canadian territory. The law also determines that a marriage cannot be void or voidable by reason only that the spouses are or the same sex.[368] This law was a reaction to several decisions in different provinces to the effect that the common-law definition of "marriage" and in the case of Quebec, the definition provided under the Article 5 of the Federal Law - Civil Harmonization Act,[369] whereby marriage "*requires the free and enlightened consent of a man and a woman to be the spouse of the other*" was invalid since it breached the right to equality of same-sex couples, secured by Section15(1) of the Canadian Charter of Rights and Freedoms.[370] The Courts of Appeal, in their decisions, reformulated the definition of "marriage" as follows: "the voluntary union for life of two persons to the exclusion of others". On 16 July 2003, the Attorney-General of Canada made a reference to the Supreme Court of Canada of a bill entitled "Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes", the aim of which was to allow same-sex partners to marry. After the Supreme Court ruling of 9 December 2004 and parliamentary debate the institution of marriage became available to all throughout the national territory.

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[363] The South African Civil Union Act allows the parties to a civil union to choose whether they want their relationship registered as marriage or as civil partnership, see Sections 2, 11, 12 South African Civil Union Act.

[364] For instance, Latvia, included in 1993 in its Civil Code that marriage between same-sex parties is prohibited, see Art. 35(2) of the Latvian *Civil Code, LK 1937 No 5, Pos 29*, as last amended by law of 11.06.1998; see also Ulrich W. Schulze, Eva Cieslar in Bergmann / Ferid / Henrich, *Internationales Ehe-und Kindschaftsrecht*, Lettland, 148. Supplement, August 2002, p. 51; see for further information concerning other jurisdictions in the USA below.

[365] *De Wet Openstelling Huwelijk*, 21.12.2000, *Staatsblad van het Koninkrijk der Nederlanden 2001*, No 9 (11.01.2001).

[366] *Loi ouvrant le mariage à des personnes de même sexe et modifiant certaines dispositions du Code civil,* 13.02.2003, Staatsblad 2003, 28 February, law opening marriage to same-sex couples and changing certain provisions of the Civil Code.

[367] Canadian Civil Marriage Act (2005, c.33), see Section 1.

[368] *Ibid.*, Section 4.

[369] 2001 Federal Law – Civil Law Harmonization Act, No 1; see also Mary C. Hurley, *Bill C-38: The Civil Marriage Act, Legislative Summary LS-502E*, Parliamentary Information Research Service, Revised 14 September 2005, available at: < http://www.parl.gc.ca/38/1/parlbus/chambus/house/bills/summaries/c38-e.pdf > (website last consulted in March 2008).

[370] *Ibid.*; see also Wade K. Wright, *The Tide in Favour of Equality: Same-sex Marriage in Canada and England and Wales,* International Journal of Law, Policy and the Family, Vol. 20 (2006), pp. 249 *et seq*.

152. Spain followed in 2005 with approval, by the Congress of Deputies,[371] of the law legalising marriage between spouses of the same sex in the entire Spanish territory.[372]

153. On 1 December 2005, the Constitutional Court of South Africa held to be unconstitutional and invalid the common law definition of marriage to the extent that it does not permit same-sex couples to enjoy the status and the benefits coupled with responsibilities that marriage accords to heterosexual couples.[373] On 14 November 2006 the bill on same-sex marriage[374] was adopted by the Parliament;[375] the South African Civil Union Act came into force on 30 November 2006. It allows same-sex and different-sex couples to register their Civil Union either as marriage or as civil partnership.[376] Whatever is chosen the requirements and the effects are the same.

154. As for the USA, in Hawaii the Supreme Court ruled in 1993 that, unless a compelling state interest for different treatment would be shown, laws denying same-sex couples the right to marry would violate the constitutional right of equal protection.[377] When in 1996 a lower instance court had ruled that the State had no such compelling reason,[378] the Constitution was changed before the envisaged Supreme Court ruling was issued.[379] The Hawaii legislature subsequently passed a law prohibiting marriage for same-sex couples. Meanwhile the Federal legislator had reacted by introducing the *Defence of Marriage Act 1996* (DOMA). The Act on the one hand stated that in Federal law marriage would only refer to a union of a man and a woman and on the other hand allowed the US-States to bar recognition of same-sex marriages. The majority of the US-States have enacted legislation to prohibit same-sex marriages and or recognition of same-sex marriages solemnised in another jurisdiction. The State of Massachusetts, however, began issuing marriage licenses to same-sex couples in May 2004 following a decision of the Massachusetts Supreme Court.[380] Same-sex marriages are recognised in Rhode Island (USA).[381]

155. Finally, even though Israel does not permit same-sex marriage, its Supreme Court stated on 21 November 2006 that the government of Israel had the obligation to recognise five same-sex marriages concluded abroad, in this case Canada.

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[371] By vote of 187 to 147.

[372] *Ley 13/2005, de 01.07.2005, por la que se modifica el Código Civil en materia de derecho a contraer matrimonio*, in *BOE 02.07.2005, núm. 153*. See for further information, *inter alia*, Miquel Martín-Casals and Jordi Ribot, "Ehe und Scheidung in Spanien nach den Reformen von 2005", in *FamRZ* 2006, pp. 1331 *et seq*.

[373] *Minister of Home Affairs and the Director-General of Home Affairs and Marié Adriaana Fourie and Cecelia Johanna Bonthuys*, CCT 60/04, and *Lesbian and Gay Equality Project and Eighteen Others and Minister of Home Affairs and the Director-General of Home Affairs and the Minister of Justice and Constitutional Development*, CCT 10/05, Constitutional Court of South Africa, 1 December 2005.

[374] South African Civil Union Act 2006.

[375] With 230 votes to 41.

[376] See Sections 2, 11, 12 South African Civil Union Act.

[377] *Baehr v. Lewin*, 852 P.2d 44 (Hawaii Supreme Court, 1993).

[378] *Baehr v. Miike* 1996 WL 694253, (Hawaii Cir. Ct. Dec. 3, 1996), 23 *Fam.L.Rep.* 2001.

[379] The Hawaii Constitution as amended in 1998 provides that the legislature should have the power to reserve marriage to opposite-sex couples.

[380] See National Conference of state Legislatures' article on Same Sex Marriage, Civil Unions and Domestic Partnerships, available at < http://www.ncsl.org/programs/cyf/samesex.htm > (website last consulted in March 2008).

[381] *Ibid*.

PART IV – ISSUES OF PRIVATE INTERNATIONAL LAW RELATING TO UNMARRIED COHABITATION

A – Introduction

156. This part of the Note deals with private international law issues relating to unmarried cohabitation. The private international law issues concerning registered partnerships will be dealt with in Part V below.

157. The report on private international law issues concerning unmarried cohabitation is relatively brief due to the limited amount of legislative activity in this area since the previous Notes[382] presented by the Permanent Bureau on the subject.

B – Applicable law

158. Among the legal systems examined here none provides for a comprehensive regulation of private international law issues concerning unmarried cohabitation.[383]

159. The Consortium Asser–UCL comparative law study concerning, *inter alia*, property aspects of unmarried cohabitation in Europe that has been carried out on request of the European Commission examines how the European Members States approach unmarried cohabitation in private international law.[384] The study shows that very few European States have adopted legislation that addresses private international law issues of unmarried cohabitation.

160. As set forth in the 1992 Note of the Permanent Bureau[385] there are two ways to deal with unmarried cohabitation in private international law – either by considering existing choice of law rules and selecting one among them or by devising an entirely new category, *i.e.*, creating a choice of law rule solely for unmarried cohabitation.

161. Considering existing choice of law rules to deal with the "new" problem of unmarried cohabitation leads to the question of characterisation. The problem of characterisation was – according to the comparative law study - also one of the main issues raised in the commentaries of the European States on treatment of unmarried cohabitation in private international law.[386] Should the phenomenon of unmarried cohabitation be considered as a matter of personal status or as a question of contract?[387]

162. As stated in Part I, unmarried cohabitation is dealt with very differently in the various jurisdictions. There are legal systems[388] that ignore unmarried cohabitation and do not consider it as a legal construct but rather as a purely factual incident. Accordingly the question of characterisation is resolved very differently.[389]

163. The following brief analysis of choice of law rules for unmarried cohabitation will be divided into the law applicable to formation and effects.

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[382] See *supra* footnote 3.

[383] See, *inter alia*, Comparative law study by the Consortium Asser-UCL, *Étude sur les régimes matrimoniaux des couples non mariés et sur le patrimoine des couples non mariés dans le droit international privé et le droit interne des États membres de l'Union européenne* (Offre No JAI/A3/2001/03), pp. 205 *et seq.*, available at < http://ec.europa.eu/justice_home/doc_centre/civil/studies/doc/regimes/report_regimes_030703_fr.pdf > (website last consulted in March 2008); Jens M. Scherpe, supra footnote 86, at p. 602.

[384] See Comparative law study by the Consortium Asser-UCL, *supra* footnote 383, pp. 205-207.

[385] Prel. Doc. No 5/1992, see *supra* footnote 3, at p. 139.

[386] *Ibid.*, at p. 206.

[387] *Ibid.*, see also Ian Curry-Sumner, *All's well that ends registered?*, supra footnote 22, pp. 317 *et seq*.

[388] For instance Germany; see regarding private international law aspects of unmarried cohabitation in Germany, *inter alia*, Stephan Lorenz / Hannes Unberath, "Nichteheliche Lebensgemeinschaft und Verlöbnis im Internationalen Privat- und Verfahrensrecht oder: 'Was es nicht gibt, knüpf' ich nicht an!'", *IPRax* 2005, pp. 516 *et seq*.

[389] See, *inter alia*, Ian Curry-Sumner, *All's well that ends registered?*, supra footnote 22, pp. 17 *et seq.*; Comparative law study by the Consortium Asser-UCL, *supra* footnote 383, pp. 206-207.

1. Law applicable to formation of the unmarried cohabitation

164. The law applicable to formation of unmarried cohabitation, whether this concerns formal or essential validity, has drawn very little attention from legislators and legal authors. It has to be kept in mind that designation of a law applicable to the formation of unmarried cohabitation involves the granting of a certain legal status to such a relationship. Those jurisdictions that do not consider unmarried cohabitation as a legally relevant institution may tend to disregard any personal nature of the cohabitants' relationship and treat their situation like that of strangers.[390] Hence, jurisdictions that in their national law do not accord status to unmarried cohabitation are unlikely to elaborate private international law rules concerning its formation or dissolution.

165. On the assumption that the phenomenon of unmarried cohabitation is a matter of personal status, it has been suggested that the law applicable to the formation of marriage should be applied by analogy. With respect to formal requirements for marriages, the principle of *locus regit actum* is widespread. Thus, the law of the State of solemnization (*lex loci celebrationis*) is very generally acknowledged and accepted as being the law, or at least one[391] of the laws, applicable. This criterion is in fact enshrined in the *Hague Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages*.[392] Regarding the law applicable to the essential validity of marriages one may identify the following approaches. The law designated may be the (*lex loci celebrationis)*[393] or the law of the nationality / domicile of each party. These approaches can be found in different jurisdictions in different variations.

166. Accordingly the law applicable to the formal requirements could be the law of the country where the cohabitation was established. The law determining the essential validity of unmarried cohabitation could be either the law of the country where the cohabitation was established or the law of each cohabitant's nationality / domicile.[394] Another approach would make the formation of unmarried cohabitation subject to the law of the cohabitants' common domicile or common nationality.[395]

167. However, the use of the *lex loci "celebrationis"* especially faces practical problems since determining where the cohabitation was established may, considering the absence of a formal act of creation, be difficult.[396] Applying the law of the countries of nationality / domicile of each partner may also be problematic, because a country of nationality / domicile might not provide for a legally relevant cohabitation.

168. Noting the recent developments in the area of private international law regarding registered partnerships (see below), which have in some countries led to the introduction of conflict of laws rules for registered partnerships differing from those for marriages, it

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[390] André Huet, "La séparation des concubins en droit international privé", in *Études offertes à Jacqueline Rubellin-Devichi – Des Concubinages – Droit interne, droit international, droit comparé*, Litec Groupe LexisNexis, Paris, 2002, pp. 539 *et seq.*, p. 543.

[391] See for instance Germany, where a marriage concluded outside Germany is formally valid, if either the formal requirements of the *lex loci celebrationis* or the formal requirements of the law of the country of nationality of the partners are fulfilled; see Jan Kropholler, *Internationales Privatrecht*, 6th edition, 2006, p. 338.

[392] Hereinafter cited as 1978 Hague Marriage Convention. The Convention was signed by Australia, Egypt, Finland, Luxemburg, the Netherlands and Portugal, but only ratified by Australia, Luxemburg and the Netherlands. See also *Examination by the European Community of existing Hague Conventions – Note drawn up by the Secretary General of the Hague Conference on Private International Law*, at p. 10.; available at < www.hcch.net > under "Work in Progress" then "General Affairs".

[393] See Petar Šarčević, "Cohabitation without Marriage: The Yugoslavian Experience", 29 *Am. J. Comp. L.*, 315 (1981), at pp. 335-338.

[394] *Ibid.*, at p. 336, favouring the second solution among these two, but finally opting for designing special conflicts rules for unmarried cohabitation (at p. 338).

[395] See, with further references, Mariel Revillard, "Les unions hors mariage – Regards sur la pratique de droit international privé", in *Études offertes à Jacqueline Rubellin-Devichi – Des Concubinages – Droit interne, droit international, droit comparé*, Litec Groupe LexisNexis, Paris, 2002, pp. 579 *et seq.*, at 581.

[396] *Ibid.*, at p. 336.

has to be considered whether it is more appropriate to use an analogy with the registered partnership conflict rules instead of the analogy with the marriage conflict rules.

169. Insofar as unmarried cohabitation is categorised as a kind of contract, the law applicable to the formation of a contract would have to be applied.

2. Law applicable to the effects of unmarried cohabitation

170. Considering the question of the law applicable to the effects of unmarried cohabitation it has again to be recalled that some jurisdictions do not consider unmarried cohabitation as a construct of any legal relevance. In their national law those jurisdictions solve disputes between cohabitants by respectively examining the relevant part of the relationship with recourse to contract law, the law applicable to corporation or unjust enrichment, depending on the circumstances.[397] Accordingly the *lex fori* approach to characterisation will lead to the application of the conflict of laws rule for contract, corporation or unjust enrichment.

171. For the jurisdictions that consider unmarried cohabitation a legally relevant phenomenon, again, the question of characterisation precedes the designation of law applicable to its effects. Unmarried cohabitation can be either considered as being of mainly contractual nature or of mainly personal nature.[398] Characterising the relationship as contractual will lead to the conflict of laws rules for contracts determining the law applicable to the effects of the relationship. Where the relationship is considered to be of personal nature the conflict of laws rule for the effects of unmarried cohabitation could be found by analogy with the conflict of laws rules for marriages or by analogy with the conflict of laws rules for registered partnerships - where existing.

172. However, it has to be borne in mind, that these solutions cannot cover all the effects of unmarried cohabitation. As in the case of marriage, many effects remain subject to separate conflict of laws rules. This is the case, for instance, for maintenance and inheritance.[399]

173. The former Socialist Federal Republic of Yugoslavia was unusual in having enacted a conflict rule[400] in regard to unmarried cohabitation, although only regulating the law applicable to property relations. Article 39[401] of the Private International Law of the Socialist Federal Republic of Yugoslavia provided that the law applicable to the property relations of persons cohabiting without formal marriage was the law of the country of which the parties were citizens (paragraph 1). It further stated that if the cohabitees did not have the same citizenship, the law applicable was that of their common residence (paragraph 2). Finally, contractual property relations between unmarried cohabitants were governed by the law which would have been applicable to their property relations at the time the contract was concluded. Croatia still uses this rule today, but only for different-sex unmarried cohabitation.[402] No private international law rule exists for same-sex cohabitation, which was only introduced in Croatia in 2003.[403]

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[397] See, *inter alia*, Hugues Fulchiron, "Réflexions sur les unions hors mariage en droit international privé", *Journal de Droit International (Clunet)*, Vol. 127, Issue 4, 2000, pp. 889 *et seq*., p. 903; on the example of Germany see Stephan Lorenz / Hannes Unberath, *supra* footnote 388.

[398] Regarding the personal nature of unmarried cohabitation, see, *inter alia*, Hélène Gaudemet-Tallon, "La désunion en droit international privé"*, RCADI*, 1991-I, Volume 226, pp. 9 *et seq*. pointing out that a "family" may exist without marriage.

[399] See Prel. Doc. No 5/1992, *supra* footnote 3, at p. 143.

[400] Art. 39 of the Private International Law of the Socialist Federal Republic of Yugoslavia of 15.07.1982; Nos 43/82, 72/82 and 53/91.

[401] Dubravka Hrabar and Aleksandra Korać, in Bergmann / Ferid / Henrich, *Internationales Ehe-und Kindschaftsrecht*, Kroatien, 169. Supplement, December 2006, pp. 17, 39.

[402] See Dubravka Hrabar, *Legal Status of Cohabitation in Croatia*, *supra* footnote 65, p. 412.

[403] Dubravka Hrabar and Aleksandra Korać, *supra* footnote 401, pp. 17, 39.

PART V – ISSUES OF PRIVATE INTERNATIONAL LAW RELATING TO REGISTERED PARTNERSHIPS

174. This part of the Note deals with the private international law aspects of registered partnerships. Since the publication of the previous Notes prepared by the Permanent Bureau, in 1992 and 2000, many developments can be noted in this area. As stated in Part II in the report regarding the national developments related to registered partnerships, many jurisdictions have introduced legislation regulating registered partnerships. In this context some of these jurisdictions, such as Germany,[404] the Netherlands,[405] Switzerland,[406] Belgium[407] and the UK[408] introduced express private international law provisions in respect to registered partnerships. The models used differ greatly; Germany, for instance, has introduced a conflict of laws rule specifically designed for registered partnership, whereas the conflict of laws rules concerning registered partnership in Switzerland render a great part of the conflict of laws rules for marriages applicable to registered partnership.

175. Nonetheless a lot of questions in regard to private international law remain unanswered even in those systems that introduced express private international law rules. Problems emerge especially in regard to characterisation, considering the diversity of systems of registered partnerships in different jurisdictions. The problem of characterisation was already briefly mentioned above in regard to the private international law treatment of unmarried cohabitation, for which almost no jurisdiction provides explicit conflict rules. The existence of private international law rules in relation to registered partnerships should not lead to the presumption that the question of characterisation is less important here. On the contrary, where express conflict rules on registered partnership exist in a jurisdiction, one may have to consider whether any foreign registered partnership in issue is a registered partnership in the sense of these rules. In view of the diversity of national laws on registered partnership, which vary in regard to conditions as well as consequences, and given that the most prominent approach to characterisation is *lex fori*-based, it is possible that jurisdictions will refrain from applying their conflict of laws rules for registered partnerships to all foreign constructs named registered partnerships. Where the express conflict rules for registered partnerships are considered not applicable to a foreign registered non-marital relationship, the search for an applicable conflict rule will touch the same questions as set forth in regard to unmarried cohabitation (see above, Part IV).

176. For instance, in Germany, where the institution of registered partnership is reserved to same-sex couples, the private international law rules on registered partnership are aligned with that concept and are therefore considered only applicable to same-sex relationships.[409] Hence a different-sex registered partnership will not be covered by the German conflict rule on registered partnerships. In regard to different-sex

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[404] Germany included a new Article in its Private International Law codification in 2001, Article 17a), which has now become Article 17b) of the *Einführungsgesetz zum Bürgerlichen Gesetzbuch* (German Introductory Code to the Civil Code – hereinafter cited as German PIL), in its last amended version of 15.12.2004.

[405] The Netherlands introduced a separate law specifically regulating private international issues of registered partnerships in 2004, which came into force on 1 January 2005. *Wet conflictenrecht geregistreerd partnerschap*, 6.7.2004 (hereinafter Dutch Registered Partnership PIL).

[406] Switzerland introduced Arts 65a) to 65d) in its Private International Law codification, the *Loi fédérale du 18 décembre 1987 sur le droit international privé* (hereinafter Swiss Private International Law); the new Articles came into force on 1 January 2007.

[407] Belgium included provisions on registered partnership in its new code on private international law of 2004, *Code de droit international privé belge, du 16 juillet 2004* (hereinafter Belgian PIL); see Arts 58–60 Belgian PIL.

[408] The UK Civil Partnership Act regulates private international law aspects in a common part for England, Wales, Northern Ireland and Scotland; see Sections 212 *et seq*. UK Civil Partnership Act.

[409] Already the decision of the legislator to use the same uncommon term for the institute of registered partnership in the conflict rule as used in the German internal law ("Eingetragene Lebenspartnerschaft") indicates which relationships can be characterised as registered partnerships in the sense of the German PIL (*lex fori* approach of characterisation); see, *inter alia*, Peter Mankowski, in Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*, Volume containing Art 13-17 EGBGB, 2003, Art. 17b) EGBGB, note 7.

registered partnerships German law therefore faces the same difficulties as legal systems that have not legislated on private international law issues of registered partnerships.

177. The situation is similar in the UK, where the UK Civil Partnership Act restricts the applicability of its provisions on foreign relationships to same-sex relationships.[410] The importance of the same-sex requirement is underlined by the fact that the UK Civil Partnership Act requires that the parties have to be considered of same sex at the relevant time not only by the *lex loci registrationis* but also by UK law.[411]

178. The Belgian law, which allows both same-sex and different-sex couples to register a partnership, restricts the applicability of its conflict rules on registered partnerships to partnerships based on cohabitation and registered with a public authority that does not create a bond between the partners akin to marriage.[412] Registered partnerships that create such a bond are in Belgian private international law treated as marriages.[413]

179. In this respect attention should be drawn to the parallel problem of characterisation of same-sex marriages. Since the introduction of same-sex marriages in several jurisdictions (see above, Part III) the question of how to deal with these marriages in private international law has arisen. In some legal systems that do not allow same-sex marriages it has been indicated that a foreign same-sex marriage would probably be classified as a registered partnership.[414] Switzerland has included this as a rule in its Private International Law.[415] In the UK Civil Partnership Act the Dutch and the Belgian same-sex marriage are included in the list of overseas relationships that can be recognised as a civil partnership.[416] This indicates that same-sex marriages will not be recognised as "marriage" in the UK.[417] A recent decision of the High Court[418] of England and Wales confirmed this presumption. How other legal systems, and especially those that have not introduced a system of registered partnerships, deal with same-sex marriages is an open question.

A – Competence of authorities to register a partnership

180. As a prelude to the discussion of applicable law principles relating to the formal or essential validity of a partnership, it may be helpful to describe the development of national rules defining the circumstances in which national authorities are competent to register a partnership. In other words, what is the connection required between the partners and the legal system concerned?

181. To register a partnership in a particular jurisdiction, most legal systems require the partners to be connected to the relevant jurisdiction by either nationality or residence. They differ, however, in whether they require these factors alternatively, cumulatively and / or in whether the requirement pertains to one or both partners.

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[410] Section 212(1)b) UK Civil Partnership Act.
[411] Sections 212(1)b) and Section 216 UK Civil Partnership Act; see also Dicey, Morris & Collins, *The Conflict of Laws*, Volume 2, 14th Edition, 2006, pp. 863, 864, note 17-218.
[412] Art. 58 Belgian PIL: *« Au sens de la présente loi, les termes 'relation de vie commune' visent une situation de vie commune donnant lieu à enregistrement par une autorité publique et ne créant pas entre les cohabitants de lien équivalent au mariage. »*
[413] Ian Curry-Sumner, *All's well that ends registered?*, see *supra* footnote 22, p. 335.
[414] For instance, for Germany see Peter Mankowski, *supra* footnote 409, Art. 13 EGBGB, notes 176 *et seq*.; for Sweden see Michael Bogdan, "Some Reflections on the Treatment of Dutch Same-Sex Marriages in European and Private International Law", in Talila Einhorn and Kurt Siehr (ed.), *Intercontinental Cooperation through Private International Law*, Essays in Memory of Peter E. Nygh, T.M.C. Asser Institute, pp. 25, 28.
[415] Art. 45(3) Swiss PIL.
[416] See Schedule 20 of the UK Civil Partnership Act.
[417] See Dicey, Morris & Collins, *supra* footnote 411, p. 822, note 17-088.
[418] High Court [2006] EWHC 2022 (Fam). The petition of a female same-sex couple, who had married in British Columbia (Canada) to have their relationship recognised not as civil partnership but as marriage was dismissed.

182. To register a partnership in Slovenia[419] and in the Czech Republic,[420] for example, it is mandatory that one of the partners is a national of Slovenia or the Czech Republic respectively. This is, however, rather an exception. Several legal systems allow the registration of a partnership of two non-nationals, although these systems mostly demand stricter requirements in regard to "residence" for non-nationals.

183. The Nordic systems[421] offer the registration of partnerships to couples where either (1) one partner is a citizen of the respective system and resides in the country or (2) both partners have been (habitually) resident in the country for a certain duration[422] immediately before the registration.

184. It is interesting to note that, in regard to the registration requirements, the Nordic countries treat nationals of certain States as being in the same position as their own national. The condition for this equal treatment is that these States have enacted legislation on registered partnerships that produces in general the same effects as the legislation enacted in the relevant Nordic State.[423] Considering the similarity between the Nordic Registered Partnership Laws it is rather self-evident that these countries regard each other's legislations on registered partnership as fulfilling the requirement. They therefore treat each other's nationals like their own nationals in regard to registration. Sweden[424] also grants this privilege to Dutch citizens; Finland[425] to Dutch and German citizens.

185. To register a partnership in Andorra at least one of the partners must be of Andorran nationality or have his or her principal and permanent residence in the Principality of Andorra.[426]

186. The Netherlands impose, as in matrimonial matters, a requirement of residence in the case of foreign partners, though without specifying a minimum duration, but this requirement is lifted if one of the partners is a Dutch national.[427] A couple residing abroad, where one partner has Dutch nationality, may register their Dutch partnership in the Netherlands or abroad.[428]

187. Under the laws of the Spanish autonomous communities, a connection between one of the partners and the autonomous community is required, either residence or another connection such as *vecindad civil* (regional citizenship) or *empadronammiento* (residence registered at the town hall). In the Basque Country and the Balearic Islands, for instance, one of the partners is required to have the regional citizenship of the autonomous community where the permanent union is to be established.[429] In Estremadura, Madrid and Valencia, one of the partners is required to have registered a residence in the autonomous community.[430]

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[419] Art. 3(2) Registered Partnership Law of Slovenia.
[420] § 5 Czech Registered Partnership Law; see also Milana Hrušáková, *supra* footnote 167, pp. 1337-1339.
[421] See, for instance, § 10 Finnish Registered Partnership Law; § 2(2) No 2 Danish Registered Partnership Law; Art. 2b) of the Icelandic Law; Chapter 1, § 2 of the Swedish Registered Partnership Law; § 2(3)(1) of the Norwegian Law.
[422] All the Nordic countries require a minimum period of two years; see relevant provisions in footnote 421.
[423] See § 2(2) Swedish Registered Partnership Law; § 10(2) Finnish Registered Partnership Law; § 2(3) Danish Registered Partnership Law; § 2 (2) Icelandic Registered Partnership Law (in the version of 2000 not yet including Finland); § 2 (2) Norwegian Registered Partnership Act (in the version of 2002 not yet including Finland).
[424] See § 2(2) Swedish Registered Partnership Law.
[425] § 10(2) Finnish Registered Partnership Law in connection with a Regulation on Registered Partnerships (last version in force since 1 May 2005).
[426] Art. 1 of the Registered Partnership Law of Andorra.
[427] Until 2001 Book 1, Art. 80a of the Dutch Civil Code provided that a partnership in the Netherland could only be registered if at least one of the partners was a Dutch national and the other, if not being a Dutch national, had a residence permit, see Katharina Boele-Woelki / Wendy Schrama, "Die nichteheliche Lebensgemeinschaft im niederländischen Recht", *supra* footnote 9, p. 316.
[428] See Book 1, Art. 80a(4) of the Dutch Civil Code.
[429] Art. 2(2) Partnership Law of the Balearic Islands (Spain); Art. 2(2) Registered Partnership Law of the Basque Country (Spain).
[430] See Art. 1(3) Partnership Law of Valencia (Spain); Art. 2(4) Partnership Law of Estremadura (Spain); Art. 1(2) Partnership Law of Madrid (Spain).

188. The Autonomous City of Buenos Aires (Argentina) requires the inscription of a residence on its territory two years at least prior to the registration.[431]

189. For the registration of a partnership in England and Wales, a minimum period of residence of seven days immediately before giving notice to the registration authority is required,[432] as is the case for the celebration of a civil marriage. However, there is no equivalent for Scotland and Northern Ireland, where a partnership may be registered without requiring a residence there.[433] These requirements, whether for England and Wales or for Scotland and Northern Ireland, are consistent with the requirements of the respective domestic legislations relating to marriage. The UK also offers the registration of a UK civil partnership at British consulates under the mandatory condition that at least one of the partners is a UK national.[434]

190. In France, residence determines the jurisdiction *ratione loci* of the court registrar or diplomatic or consular agent empowered to register the Pacs. The partners make a joint declaration to the registry of the court at first instance of their joint residence. Two persons residing abroad may also register the declaration of a Pacs with a diplomatic or consular agent, provided that one of them is a French national.[435] In Luxemburg, the declaration is made before the civil registrar of the place of the partner's common domicile or residence.[436] Belgium, like Luxemburg, also imposes the requirement of residency only indirectly by providing that the declaration of legal cohabitation is to be made to the registration officer of the common domicile.[437] Switzerland, for its part, requires the application for registration to be submitted to the civil registrar of one partners' domicile.[438]

191. Unlike the majority of systems providing for registered partnerships, Germany imposes no requirement relating to either partners' residence or nationality. No connection with Germany is required, so that temporary presence is sufficient to allow the registration of a partnership.[439]

192. Summarising the requirements that apply to the question of competence to register a partnership, few States impose a strict criterion of nationality, the exception being Slovenia and the Czech Republic. Other systems use nationality as an alternative to residence. In regard to the criterion of nationality the Nordic model provides for a special rule according to which States treat nationals of a State having equivalent legislation with respect to registered partnership like their own nationals. Several States require at least one of the partners to be resident or habitually resident in the country of registration for a certain duration immediately prior to the registration. Finally, there is the German model, where no requirement of residence or nationality is imposed.

B – Applicable law

193. The following analysis of private international law rules in regard to registered partnerships will be divided into a consideration of the law applicable to formation, effects and dissolution.

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[431] Art. 1c) Civil Union Law of the Autonomous City of Buenos Aires (Argentina).
[432] Section 8(1)b) UK Civil Partnership Act.
[433] The same is true for marriage: in both Scotland and Northern Ireland there is no marriage requirement imposed on parties wishing to marry, see Ian Curry-Sumner, *All's well that ends registered?*, *supra* footnote 22, p. 215.
[434] Further conditions are that the authorities of the place of registration do not object and that insufficient facilities exist for the partners to enter into a registered partnership in that country or territory, see Section 210 of the UK Civil Partnership Act. The UK Civil Partnership Act also includes a special provision on registration by armed forces personnel.
[435] Art. 515-3 French Civil Code.
[436] Art. 3(1) Luxemburg Registered Partnership Law.
[437] Art. 1476 Belgian Civil Code.
[438] Art. 5(1) Swiss Registered Partnership Law.
[439] Art. 17b)(1) German PIL; see Peter Mankowski, *supra* footnote 409, Art. 17b) EGBGB, note 3.

194. The term registered partnership in this part of the Note will be used without necessarily pointing out which kind of registered partnership is envisaged by the relevant conflict rule. It should therefore be kept in mind that the conflict rules in most jurisdictions address registered partnerships which correspond to their national concepts of registered partnership.

1. Law applicable to the formal and essential validity of registered partnerships

195. As mentioned above, the legal systems which introduced conflict of laws rules for registered partnerships followed different approaches. Certain jurisdictions apply to registered partnerships wholly or partly *mutatis mutandis* the rules of conflict of laws relating to marriage, whereas others have instead adopted conflict rules specifically designed for registered partnerships. The legal systems that use the conflict rules relating to marriages, by either applying them *mutatis mutandis* or repeating their wording in the conflict rules for registered partnership, may of course differ in their private international law solutions, since the conflict rules for marriage are by no means uniform.

a) Law applicable to formal requirements of registered partnerships

196. With respect to formal requirements for marriages, the law of the State of solemnization (*lex loci celebrationis*) is very generally acknowledged and accepted as being the law, or at least one of the laws, applicable (see above Part IV, B, 1). Thus legal systems applying to registered partnerships *mutatis mutandis* the conflict rules on marriages are likely to apply the *lex loci celebrationis* to the formal requirements of registered partnerships.

197. This is the case, for instance, in Switzerland where the formal requirements for a marriage celebrated in Switzerland and accordingly for partnerships registered in Switzerland are governed by Swiss law. Similarly, in the Czech Republic the *lex loci celebrationis* which applies to the formal requirements for a marriage determines the formal requirements of a registered partnership.[440]

198. The Danish Registered Partnership Law provides that all Danish legislation relating to marriages should be applied *mutatis mutandis* to registered partnerships.[441] The Danish law expressly excludes from the *mutatis mutandis* application provisions originating from international treaties ratified by Denmark unless the other State parties agree to such an application.[442] Accordingly, when an international treaty uses the terms "marriage" or "spouses" they have to be understood literally. Regarding the application of the non-treaty based choice of law rules on marriages to registered partnerships another problem arises, since in Denmark those rules are to a large extent judge-made and the Danish Registered Partnership Law only refers to codified law on marriage. However, it has been indicated that similar to the formation of marriages in Denmark, Danish law is applied to determine the formal validity of a registered partnership in Denmark as the law of its registration.[443]

199. The situation in Norway is similar. The Norwegian Registered Partnership Law provides for a *mutatis mutandis* application of the Norwegian legislation dealing with marriage and spouses but the choice of law rules for marriages are judge-made and are

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[440] See § 20 of the Czech PIL, Sb, No 97/1963, as last amended on 31.05.2006. In the Czech Republic the private international law rules concerning marriages *mutatis mutandis* to registered partnerships. However, this is not expressly mentioned in the Czech Registered Partnership Law, since it was considered unnecessary given the far-reaching equal treatment of registered partnership and marriage in Czech Law, see Petr Bohata, *supra* footnote 167, p. 40.

[441] § 3(2) Danish Registered Partnership Law.

[442] See Maarit Jänterä-Jareborg, "Registered Partnership in Private International Law: The Scandinavian Approach", in Katharina Boele-Woelki and Angelika Fuchs (eds.), *Legal Recognition of Same-Sex Couples in Europe*, Intersentia, Antwerp, Oxford, New York, 2003, p. 139; see § 4(4) Danish Registered Partnership Law.

[443] See Maarit Jänterä-Jareborg, *supra* footnote 442, at p. 140.

therefore not included in the express reference.[444] The question whether judge-made choice of law rules relating to marriage should nonetheless be applied is highly controversial and not yet resolved.[445] However, it has been indicated that Norwegian law is applied to the formal validity of a registered partnership in Norway.[446]

200. The situation in Iceland resembles the situation in Denmark and Norway.[447]

201. In Sweden, where the private international law on marriage and spouses is largely codified,[448] the Registered Partnership Law makes certain conflict of laws provisions for marriages applicable.[449] Explicitly excluded is the application of provisions based on the inter-Nordic Convention of 1931, which regulates certain international law aspects of marriage, adoption and guardianship.[450] According to that reference the non-treaty based marital conflict rules govern the formal validity of a registered partnership in Sweden are governed by Swedish law.[451]

202. Other legal systems have created conflict rules for registered partnerships that do not refer to the rules applicable to marriages. However, some of those are in fact largely based on rules applicable to marriage.[452]

203. In Finland, for instance, where choice of laws rules are included in the Finnish Registered Partnership Law, the right to the registration in front of a Finnish authority is governed by Finnish law.[453] This rule resembles the choice of law rule for the formation of marriages in Finland.[454]

204. The Netherlands uses nearly the identical wording to that used in the conflict rules concerning the formation of marriages.[455] According to that rule the formal validity of a registered partnership in the Netherlands are governed by Dutch internal law. If neither partner is a Dutch national they can also conclude their registered partnership before a diplomatic representation or consulate of another State in the Netherlands, in accordance with the law of that other State,[456] thus the *lex loci registrationis*. This exception is the same for marriages.

205. In Quebec (Canada) the law applicable to the formal requirements of a registered partnership is, as for the formal requirements of marriage, the *lex loci celebrationis*.[457]

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[444] § 3(2) Norwegian Registered Partnership Law; see also Maarit Jänterä-Jareborg, *supra* footnote 442, at p. 141.
[445] Maarit Jänterä-Jareborg, *supra* footnote 442, at pp. 141, 142.
[446] *Ibid*., at pp. 141, 142
[447] *Ibid*., at pp. 146, 147.
[448] *Ibid*., at p. 143.
[449] Chapter 1, § 9(3) Swedish Registered Partnership Law.
[450] Chapter 3, § 4 Swedish Registered Partnership Law. The fact that only one international treaty is expressly mentioned in the Swedish Registered Partnership Law has lead some voices to question whether that means, *e contrario*, that other treaty-based provisions on marriage or spouses are applicable; see Maarit Jänterä-Jareborg, *supra* footnote 442, at pp. 145, 146.
[451] Chapter 1, § 9(3) Swedish Registered Partnership Law in connection with Chapter 1, § 4 of the Swedish Act on Certain International Legal Relationships Relating to Marriage and Guardianship, *Lag (1904:26 s.1) om vissa internationella rättsförhållanden rörande äktenskap och förmynderskap* as last amended by Lag *(2005:431)*.
[452] See for example the Netherlands. The Netherlands introduced a law on conflict of laws concerning registered partnership in 2004: *Wet conflictenrecht geregistreerd partnerschap*, 6.7.2004 (hereinafter Dutch Registered Partnership PIL).
[453] § 11 Finnish Registered Partnership Law.
[454] See § 114 Finnish Marriage Law, which states that "[a] marriage ceremony before a Finnish authority in Finland or in a foreign State shall be performed in accordance with the formal requirements in the law of Finland".
[455] See for the registered partnership Art. 1(3) Dutch Registered Partnership PIL and for the marriage Art. 4 of the *Wet conflictenrecht huwelijk*, 7.9.1989 (Dutch Private International Law for Conclusion of Marriages).
[456] Art. 2(1) Dutch Registered Partnership PIL.
[457] Art. 3090.1(1) Civil Code of Quebec (Canada) for civil unions; Art. 3088(2) Civil Code of Quebec (Canada) in regard to marriage.

206. But there are some legal systems[458] that have indeed introduced conflict rules especially designed for registered partnerships that deliberately depart from the principles regarding marriages.

207. Germany is an example of this. The law applicable to the formation, effect and dissolution of the registered partnership is the *lex loci registrationis.*[459] Since in most cases a partnership will be registered in the place of its conclusion, using the *lex loci registrationis* rule in relation to formal requirements will lead in practice to the application of the *lex loci celebrationis*. However, some legal systems, such as France[460] and the UK[461] offer the possibility to conclude a registered partnership abroad. Here the *lex loci registrationis* and the *lex loci celebrationis* rule lead to the application of different laws, which can be decisive in a particular case, since it might be that the registered partnership is only formally valid according to one of these laws.

208. The UK also chose the *lex loci registrationis* as the law governing the formal requirements of a registered partnership.[462] There is, however, a remarkable difference from the *lex loci registrationis* referral in German law. The UK referral includes the rules of private international law of the country of registration whereas the German referral leads directly to the internal law of that legal system.[463] The former approach is also taken by Dutch law, so that the reference to the *lex loci registrationis* (see above) includes the application of the private international law rules of that jurisdiction.[464]

209. The solution of applying the *lex loci registrationis* to registered partnerships has also raised wide interest among legal authors. Since the greatest differences among the legal systems in regard to the formation of registered partnerships concern the essential requirements and the conflict rules used or suggested in regard to the essential requirements differ more widely, as will be examined below, the *lex loci registrationis* approach will be examined more closely below.

b) Law applicable in regard to the essential requirements

210. The conflict rules concerning the essential validity of a registered partnership are more diverse than those in regard to the formal requirements.

211. Among the conflict rules used in different legal systems one can again distinguish those copying the equivalent conflict rules for marriage or providing for a *mutatis mutandis* application of these rules, and those that establish conflict rules different from those for marriage. Again, it has to be emphasised that the use of the conflict rules related to marriage may of course result in different solutions since the private international law related to marriage differs from jurisdiction to jurisdiction.

212. In conflict rules concerning the essential requirements for a marriage, many States traditionally use the connecting factors of nationality or domicile; the former being more used by civil law jurisdictions and the latter traditionally used in common law jurisdictions. In Germany,[465] Belgium[466] and the Czech Republic,[467] for instance, the essential requirements for a marriage are reviewed in the light of the law of the

[458] For instance Germany, which chose to appoint the *lex loci registrationis* as governing law for formation, effects and dissolution of a registered partnership while for marriage the connecting factor of nationality plays an important role.
[459] The referral is explicitly a referral to the internal foreign law excluding the foreign conflict of laws rules.
[460] See Art. 515-3 French Civil Code; at least one of the partners has to have the French nationality.
[461] See Section 210 UK Civil Partnership Act; at least one of the partners has to be a United Kingdom national.
[462] Section 215(1)b) in connection with Section 212(2) UK Civil Partnership Act.
[463] See Section 212(2) UK Civil Partnership Act; Art. 17b)(1) German PIL.
[464] Art. 2(2) Dutch Registered Partnership PIL.
[465] Art. 13(1) German PIL, concerning possible exceptions see Art. 13(2) German PIL.
[466] Art. 46 Belgian PIL. An exception to this principle is provided for as regards the marriage of same-sex couples.
[467] § 19 Czech PIL.

nationality of each party. England[468] and Quebec (Canada)[469] are examples of jurisdictions that use the connecting factor domicile.

213. Transposing these connecting factors to registered partnership, may be difficult bearing in mind that, first, registered partnerships are, unlike the institution of marriage, still not available in the majority of countries,[470] and second, the rules on how to establish a registered partnership differ much more from legal system to legal system than those on marriage.

214. Concerns about the usage of the traditional connecting factors nationality and domicile to determine the essential requirements for a registered partnership have been set out by several legal authors.[471] The connecting factors nationality and domicile have been considered as too restrictive, since they allow registration of a partnership only when both partners' countries of nationality or domicile have the legal construct of registered partnership and allow a registered partnership with a person such as the proposed partner.

215. It has been suggested that the *lex loci celebrationis* or *lex loci registrationis* should govern the essential requirements of a registered partnership in order to allow more couples to register their relationship. The disadvantage of departing from the connecting factors nationality and domicile is the risk of creating limping relationships,[472] *i.e.*, relationships that are valid in the jurisdiction of celebration or registration but not in the legal system closely connected to the partners by nationality or domicile.

216. A number of jurisdictions,[473] however, use the *lex loci celebrationis* to determine the essential requirements of a registered partnership. Some do so in combination with the use of the connecting factor nationality. This is the approach also supported by the 1978 Hague Marriage Convention. The Convention provides as a general rule that the marriage may be celebrated when the essential requirements under the domestic law of the State of celebration are satisfied, provided that one of the spouses is a national of that State or has his or her habitual residence there (Art. 3(1)).

217. One of the jurisdictions that employs primarily the *lex loci celebrationis* as the law applicable to the essential requirements for marriage is Switzerland. This rule is applied *mutatis mutandis* to registered partnerships.[474]

218. The majority of legal systems that have legislated on registered partnership seem to follow the *lex loci celebrationis* or the *lex loci registrationis* approach, and by doing so most of them depart from the approach they use in matrimonial matters.

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[468] See, *inter alia*, Dicey, Morris & Collins, *The Conflict of Laws*, *supra* footnote 411, pp. 810, 830, notes 17R-054 and 17R-118.

[469] Quebec being an example of a mixed jurisdiction using the domicile approach; see Art. 3088(1) Civil Code of Quebec (Canada) provides that marriage is governed with respect to its essential validity by the law applicable to the status of each of the intended spouses, which is, in Quebec, by virtue of Art. 3083 Civil Code of Quebec (Canada) the law of his / her domicile. The formal validity of a marriage, however, is governed by the law of the place of its solemnization or by the law of the country of domicile or of nationality of one of the spouses, see Art. 3088(2) Civil Code of Quebec (Canada).

[470] There are currently around thirty legal systems that have legislated on registered partnership, as defined for the purpose of this Note.

[471] See, *inter alia*, Ian Curry-Sumner, *All's well that ends registered?*, *supra* footnote 22, p. 389; Guillaume Kessler, "Les partenariats enregistrés en droit international privé", *Bibliothèque de droit privé*, Tome 431, 2004, pp. 107 *et seq*.; Alain Devers, "Le concubinage en droit international privé", *Bibliothèque de droit privé*, Tome 416, L.G.D.J., 2004, p. 167; Hugues Fulchiron, *Pacs et partenariats enregistrés en DIP français, Aspects de droit international privé des partenariats enregistrés en Europe*, Actes de la XVIe Journée de droit international privé of 5 March 2004, Lausanne, organised jointly by the Swiss Institute on Comparative Law and the Centre of Comparative Law, European Law and Foreign Legislation of the University of Lausanne, 2004, p. 99.

[472] See, *inter alia*, Peter Mankowski, *supra* footnote 409, Art. 17b) EGBGB, note 2.

[473] For instance, Switzerland, see Art. 44(1) Swiss PIL that appoints Swiss law to govern the substantial requirements for a marriage in Switzerland. An exception is made for foreign spouses whose marriage is not possible under Swiss law but is possible under that law of the country of one of the spouses, Art. 44(2) Swiss PIL.

[474] See Art. 65a) Swiss PIL in connection with Art. 44(1) Swiss PIL.

219. A jurisdiction that uses the *lex loci celebrationis* with respect to the essential validity of registered partnerships is, for instance, Quebec (Canada).[475] Similarly, the *lex loci registrationis* approach in regard to the essential requirements, without regard to any other connecting factor such as domicile or residence, or nationality is used, *inter alia*, by Germany[476] and Denmark[477].

2. Law applicable to the effects of registered partnerships

220. Legal systems that have legislated on private international law aspects of registered partnerships agree in that not all effects of a registered partnership can be dealt with under the same conflict rule; the effects of a partnership are divided between general effects, effects related to inheritance, effects related to children *etc*. This differentiation corresponds with the traditional approach in regard to the effects of marriage. The conflict rules created for registered partnership mostly concern only some general effects of the partnership, for instance the effect of the partnership on the duties and rights of the partners towards each other and effects regarding property rights. Effects with regard to children and to inheritance are to be dealt with under the relevant conflict law for theses matters.[478]

221. The following comparison concentrates on the conflict rules created specifically for registered partnerships, which concern some general effects of the partnership.

222. Among legal systems that have legislated on registered partnerships one can again find different approaches. Some legal systems use the connecting factor of nationality, (common) residence, or domicile; others apply the *lex loci registrationis*.

223. Switzerland is an example of a legal system that uses the connecting factors of residence or nationality. As stated above, Switzerland provides for a global *mutatis mutandis* application of the conflict rules for marriage, which also embraces the effects of registered partnerships. According to these conflict rules the general effects of the partnership are governed by the law of the common residence of the partners or, where the partners reside in different States, by the law the State of residence with the closer connection.[479] For the property regime, the parties may choose as the governing law the law of the State of their (future) common residence, the law of the home country of one of the partners or – as specifically added for registered partnerships - the *lex loci registrationis*.[480] The choice of law can be changed by the parties. Subject to any contrary express provision, the change of the chosen law will have a retroactive effect. In the absence of a choice of law the law governing the property regime is determined by a "cascade rule" which uses the connecting factor of residence and nationality.[481]

224. According to Swiss law it is therefore possible that a dispute between parties regarding the effect of their partnership, although registered in Switzerland, has to be decided on the basis of foreign law.

225. In Quebec (Canada) the general effects of the registered partnership are, in a departure from conflict the rule on the effects of marriage, governed by the *lex loci celebrationis.*[482] The law of Quebec contains an additional conflict rule concerning the effects of the dissolution of the partnership. They are governed by the law applicable to the dissolution, which may be either the *lex loci celebrationis* or the law of the partners' country of domicile.[483]

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[475] Art. 3090.1(1) Civil Code of Quebec (Canada); the formal validity is governed by the law of the place of solemnisation.
[476] Art. 17 b) German PIL; see, *inter alia*, Karl August von Sachsen Gessaphe, "Le partenariat enregistré en droit international privé allemand: Aspects de droit international privé des partenariats enregistrés en Europe", Actes de la XVIe Journée de droit international privé du 5 mars 2004 à Lausanne, Publications de l'Institut de droit comparé, pp. 9 *et seq*., in part. p. 15.
[477] See above.
[478] See, *inter alia*, Ian Curry-Sumner, *All's well that ends registered?*, *supra* footnote 22, pp. 488 *et seq.*
[479] See Art. 65c) in connection with Art. 48 Swiss PIL.
[480] See Art. 65c) in connection with Art. 52 Swiss PIL.
[481] See Art. 65c) in connection with Art. 54 Swiss PIL.
[482] Art. 3090.1(2) Civil Code of Quebec (Canada) regarding civil union, Art. 3089 Civil Code of Quebec (Canada) regarding marriage.
[483] Art. 3090.2 Civil Code of Quebec (Canada), regarding the law applicable to the dissolution in detail below, especially regarding the case where the parties have their domicile in different countries.

226. Examples of jurisdictions that employ the *lex loci registrationis* in regard to the effects of registered partnership are Germany, Belgium and the Netherlands. The Belgian Private International Law determines the *lex loci registrationis* to be the law applicable to registered partnerships, including its effects on property.[484]

227. In Germany the general effects of a registered partnership and also the effects on property of the registered partnership are governed by the *lex loci registrationis*.[485] This referral is a referral directly to the internal law of the State of registration. The emphasis on the *lex loci registrationis* in German law is very strong. And even though effects of the registered partnership in regard to maintenance and inheritance are subject to another conflict rule, as is the case in other jurisdictions, the German law brings in the *lex loci registrationis* as a safety net. Where no maintenance or inheritance right is granted to a registered partner by the law applicable these issues are to be governed by the *lex loci registrationis*.[486] Another interesting feature of German law is that a foreign partnership may in Germany not exceed the effects of a German registered partnership. This restrictive clause is the result of a political compromise designed to rule out the possibility of giving partners of a foreign registered partnership more rights than partners of a German registered partnership.[487] It was feared that otherwise a foreign registered partnership might have legal consequences equal to that of marriage which was, having regard to the special protection of "marriage" in the German constitution, considered constitutionally problematic.

228. It is interesting to note that some jurisdictions that use the *lex loci registrationis*-approach provided for the situation where a partnership is registered in more than one jurisdiction. This is, indeed, a problem of practical relevance, since the requirement of exclusivity, as examined above, in many jurisdictions only forbids the registration of a partnership, where one of the partners is in a registered partnership with a third person, but does not forbid the registration where the partners have already registered their partnership in another jurisdiction. Many registered partners have already used the possibility of registering their partnership anew in another jurisdiction when moving to this jurisdiction, mainly because of concerns about the recognition of their partnership. Hence, it may become necessary to define which registration is the relevant one. Belgium[488] has chosen to refer to the first registration, whereas Germany[489] decided to let the law of the State which registered the last partnership govern the effects of the partnership.

229. There is, however, a further approach, which has not been discussed before. Some legal systems apply to the effect of any foreign registered partnership that is recognised in their system simply their own law. This approach is referred to as *lex fori*-approach and has, not surprisingly, received support in common law countries, which traditionally tend to favour the application of the *lex fori* in many fields of family law.[490] It is, for example, used in the UK, where a foreign registered partnership may be recognised as a Civil Partnership and will then generate exactly the same effects as a partnership registered in the UK.[491] Also the law of California (USA) provides that a registered partnership that was validly formed in another jurisdiction, and that is substantially equivalent to a Californian domestic partnership, will be recognised as a domestic partnership.[492]

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[484] Art. 60 Belgian PIL.
[485] Art. 17b)(1) German PIL.
[486] Art. 17b)(1) German PIL.
[487] See Peter Mankowski, *supra* footnote 409, Art. 17b) EGBGB, notes 83, 84.
[488] Art. 60(1) Belgian PIL.
[489] Art. 17b)(3) German PIL.
[490] See, Ian Curry-Sumner, *All's well that ends registered?*, *supra* footnote 22, pp. 511 *et seq.*
[491] Sections 212 *et seq.* UK Civil Partnership Act.
[492] See Section 299.2 Family Code of California (USA).

3. Law applicable to the dissolution of registered partnerships

230. In the Netherlands the dissolution of a registered partnership is governed by the *lex fori*. An exception to the rule is only possible for registered partnerships concluded abroad.[493] Here the parties may – under certain circumstances - choose the law of the jurisdiction in which the registered partnership was established as the law governing the dissolution.[494] The chosen law, however, only governs the essential requirements of the dissolution; the form and manner of dissolution is in any case governed by Dutch law.[495]

231. In Switzerland the dissolution of a registered partnership is governed by the *lex fori*.[496] However, if the partners have a common foreign nationality and only one of them has his / her residence in Switzerland the law applicable is instead the law of the common nationality,[497] provided that law contains rules on registered partnerships.[498]

232. In Germany[499] and Belgium[500] the dissolution of the registered partnership is governed by the *lex loci registrationis*.

233. In Quebec (Canada) the dissolution of a registered partnership is governed by the law of the domicile of the spouses or by the *lex loci celebrationis*.[501] Where the parties are domiciled in different countries the law applicable is the law of their common place of residence or, if they have no common place of residence, the law of the place of their last common residence.[502] In absence of a former place of common residence the law applicable may also be the law of the court seized of the application for dissolution (*lex fori*).[503]

C – Recognition of the registered partnership

234. The following part will deal with the recognition of foreign registered partnerships, the effects of recognition and the issue of multiple registrations. It will also include a short overview of the *Convention on the Recognition of Registered Partnerships* (hereinafter ICCS Convention on the Recognition of Registered Partnerships), which has been adopted by the General Assembly of the International Commission in Civil Status (ICCS) in March 2007. The condition for its coming into force is the ratification, acceptance or approval by at least two States.[504] The Convention was adopted on 22 March 2007 by Member States of the ICCS and was opened for signatures in September 2007.[505]

1. Recognition of a foreign registered partnership

235. As already pointed out, registered partnerships, though far from being as common as marriage or other forms of cohabitation outside marriage, are now a feature of some thirty jurisdictions.[506] Certain States already recognise partnerships registered abroad, at least those displaying features similar to those of their own domestic partnerships. Recognition is important in many respects. Recognition of a foreign registered partnership offers legal certainty and stability to couples and families based on registered

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[493] Art. 23(1) Dutch Registered Partnership PIL.
[494] Art. 23(2) and (3) Dutch Registered Partnership PIL; see also Ian Curry-Sumner, *All's well that ends registered?, supra* footnote 22, pp. 457, 458.
[495] Art. 23(4) Dutch Registered Partnership PIL.
[496] Art. 65a) Swiss PIL in connection with Art. 61(1) Swiss PIL.
[497] Art. 65a) Swiss PIL in connection with Art. 61(2) Swiss PIL.
[498] See Art. 65c (1) Swiss PIL, which provides that Swiss law is applicable where the foreign law, appointed by the relevant conflict rules, does not contain rules on registered partnership.
[499] Art. 17b)(1) German PIL.
[500] Art. 60 Belgian PIL.
[501] Art. 3090.2 Civil Code of Quebec (Canada).
[502] Art. 3090.3 Civil Code of Quebec (Canada).
[503] *Ibid.*
[504] More precisely, the "… Convention shall enter into force on the first day of the fourth month following the month of deposit of the second instrument of ratification, acceptance or approval", see Art. 19 of the Convention.
[505] The Convention is available in French on the website of the ICCS:
< http://www.ciec1.org/ListeConventions.htm > (website last consulted in March 2008).
[506] See Ian Curry-Sumner, "Uniform Patterns Regarding Same-Sex Relationships", *supra* footnote 182, p. 188.

partnerships. It avoids limping relationships and also situations in which one partner enters into a second partnership or a marriage without having dissolved the earlier partnership.

236. Among the jurisdictions that have legislated on registered partnerships many also provide for rules on the recognition of foreign registered partnerships. These rules, however, differ greatly from legal system to legal system.

237. Many jurisdictions have introduced recognition rules that employ principles embodied in the 1978 Hague Marriage Convention.[507] Article 9 of that Convention lays down the fundamental principle that: "*A marriage validly entered into under the law of the State of celebration or which subsequently becomes valid under that law shall be considered as such in all Contracting States, subject to the provisions of this Chapter.* [...]". However, many of these jurisdictions refer to the *lex loci registrationis* regarding the validity of registered partnerships rather than to the *lex loci celebrationis*. As impediments to recognition some legal systems have introduced criteria similar to those listed in Article 11[508] of the 1978 Hague Marriage Convention. Thus, an exception to recognition is sometimes provided for when the principle of exclusivity has not been observed, *i.e.*, when a partnership is registered even though one of the partners, at the time of the registration, was already a party to an undissolved partnership or marriage. In similar fashion to the provisions of Article 11, paragraph 1, sub-paragraphs 2 and 3 of the Convention, an exception to recognition may apply in some States when a partnership, although validly registered in the State of registration, breaches the prohibited degrees applicable in the State of recognition, or the age required to enter into a partnership. The exceptions provided for under Article 11, paragraph 1, sub-paragraphs 4 and 5 of the Convention may also be applied in connection with the recognition of a registered partnership, enabling an objection to recognition of the registered partnership in the absence of consent by a partner, either on the grounds of incapacity to consent at the time of the partnership's registration or because he or she did not consent freely, according to the law of the State of recognition.

238. The Netherlands legal system is one that has introduced provisions on recognition of foreign registered partnerships greatly inspired by the 1978 Hague Marriage Convention. In parallel to Article 9 of the Convention (but using the *lex loci registrationis* instead of the *lex loci celebrationis*) the Dutch law provides that a foreign registered partnership can be recognised if it has been concluded in accordance with the *lex loci registrationis* or it has later gained validity in accordance with that law.[509] Inspired by Article 11 of the 1978 Hague Marriage Convention, the Dutch law sets out certain minimum requirements.[510] To be recognised in the Netherlands a registered partnership has to be based on cohabitation of two people that maintain a close personal relationship. It has to be registered at a competent authority and comply with the requirement of exclusivity. Furthermore the Dutch law requires that the registered

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[507] See also Guillaume Kessler, *supra* footnote 471, p. 276.

[508] Art. 11 of the 1978 Convention provides that:

"A Contracting State may refuse to recognize the validity of a marriage only where, at the time of the marriage, under the law of that State -

(1) one of the spouses was already married; or

(2) the spouses were related to one another, by blood or by adoption, in the direct line or as brother and sister; or

(3) one of the spouses had not attained the minimum age required for marriage, nor had obtained the necessary dispensation; or

(4) one of the spouses did not have the mental capacity to consent; or

(5) one of the spouses did not freely consent to the marriage.

However, recognition may not be refused where, in the case mentioned in sub-paragraph 1 of the preceding paragraph, the marriage has subsequently become valid by reason of the dissolution or annulment of the prior marriage."

[509] Art. 2(1) Dutch Registered Partnership PIL. This referral includes the private international law provisions of the State of registration; see Art. 2(3) Dutch Registered Partnership PIL.

[510] Art. 2(5) Dutch Registered Partnership PIL.

partnership creates obligations between the parties corresponding to those which apply to spouses.[511] In parallel to Article 10 of the 1978 Hague Marriage Convention, which requires that "*Where a marriage certificate has been issued by a competent authority, the marriage shall be presumed to be valid until the contrary is established*." the Netherlands introduced a presumption of validity in regard to registered partnerships. Such a presumption exists where the authority of registration issues a declaration of validity of the registered partnership.[512]

239. The principle of Article 9 of the 1978 Hague Marriage Convention can also be found in Finland, where a foreign registered partnership is recognised when it is valid in the State of registration,[513] although, again, in contrast to the Convention the *lex loci registrationis* is referred to instead of the *lex loci celebrationis*. Similarly in Switzerland a foreign registered partnership is recognised if it was validly concluded abroad. However, Swiss law provides for a further exception. A foreign registered partnership may not be recognised if it was concluded abroad in order to circumvent Swiss law if both partners have their residence in Switzerland or one of them is a Swiss national.[514]

240. According to the UK Civil Partnership Act a foreign registered partnership can be recognised in the UK when two people of the same sex, who were not already party to a civil partnership or valid marriage, have validly established a registered partnership, in accordance with the *lex loci registrations,* having had legal capacity to enter into such a relationship in accordance with that law. A further condition for recognition is that the partnership creates the effect under the lex *loci registrationis* that the partners are treated as a couple or married.[515] Expressly mentioned in the UK Civil Partnership Act as relationships that are potentially recognisable are the Belgian statutory cohabitation, the Belgian same-sex marriage, the domestic partnership of Nova Scotia (Canada), the civil union of Quebec (Canada), the Danish and Finnish registered partnership, the French Pacs, the German life partnership, the Icelandic confirmed cohabitation, the Dutch registered partnership and same-sex marriage, The Norwegian and Swedish registered partnership and the civil union of Vermont (USA).[516]

241. The State of Connecticut (USA) provides that a foreign registered partnership (civil union) in which one or both partners are citizens of Connecticut shall be valid, when they had legal capacity to contract such civil union according to Connecticut law and the registered partnership was celebrated in conformity with the *lex loci celebrationis.*[517]

242. In Quebec (Canada) a registered partnership (civil union) is considered valid, when it fulfils the requirements of essential and formal validity of the *lex loci celebrationis*.[518]

243. According to Article 2 of the ICCS Convention on the Recognition of Registered Partnerships all partnerships registered in one Contracting State are to be recognised as valid by the other Contracting States.[519] However, recognition of the validity of a partnership under the Convention is not meant to imply the recognition of all its effects; the Convention aims at the recognition of the civil status effects.[520] The effects of a recognition under the Convention will be dealt with below (see IV C 2).

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[511] See Ian Curry-Sumner, *All's well that ends registered?*, *supra* footnote 22, p. 344.
[512] Art. 2(4) Dutch Registered Partnership PIL.
[513] § 12 Finnish Registered Partnership Law.
[514] Art. 65a) in connection with Arts 45(1) and (2) Swiss PIL.
[515] See Sections 212 *et seq*. UK Civil Partnership Act.
[516] See Schedule 20 of the UK Civil Partnership Act.
[517] See Section 13 Civil Union Act of Connecticut (USA); in addition civil unions celebrated in the presence of the ambassador or minister of the registering country in the USA or ambassador or minister of the USA in a foreign country etc. are dealt with separately in Section 13.
[518] Art. 3090.1 Civil Code of Quebec (Canada).
[519] See Arts 2 and 14(1) ICCS Convention on the Recognition of Registered Partnerships.
[520] See Explanatory Report of the ICCS Convention in the Recognition of Registered Partnerships, Art. 2; available at the website of the ICCS: < http://www.ciec1.org/ListeConventions.htm > (website last consulted in March 2008).

244. The ICCS Convention provides that recognition of a registered partnership may only be refused on the grounds listed in Article 7 of the Convention.[521] These reasons for refusal of recognition are very close to those set out in Article 11 and 14 of the 1978 Hague Marriage Convention. The reasons for refusal of recognition in the ICCS Convention include the degree of relationship between the partners, the existence of an undissolved marriage or partnership, lack of mental capacity to consent or the absence of freely given consent.[522] Recognition may also be refused if one of the partners had not reached the minimum age required under the law of the requested State or for public policy reasons. All these reasons can – although in slight variation – be found in the 1978 Hague Marriage Convention. In addition the ICCS Convention allows refusal of recognition where neither partner was connected to the State of registration by nationality or habitual residence at the time of its establishment. This may concern, for instance, partnerships registered in Germany, since German law does not require any connection of the partners to Germany by nationality or residence in order for the partnership to be registered.[523]

245. The ICCS Convention on the Recognition of Registered Partnerships covers the recognition of same-sex and different-sex registered partnerships, but it allows Contracting States to restrict the applicability of the Convention by way of reservation to same-sex registered partnerships.[524]

2. Effects of recognition

246. If recognition of the validity of a registered partnership is accepted, or at least partially accepted, what are the legal effects of a recognition? As set forth in the Part II of this Note, the effects arising out of registered partnerships vary substantially between jurisdictions.

247. The ICCS Convention on the Recognition of Registered Partnerships focuses, as mentioned above, on the civil-status effects and is neutral as regards effects concerning property or social effects *etc*.[525] In regard to the civil status effects the Convention follows a *lex loci registrationis*-approach. Article 4 of the Convention sets forth that, to the extent that the law of the State of registration provides so, a partnership constitutes an impediment to a future marriage or partnership of one of the partners.

3. Issue of multiple registrations

248. The absence of rules on recognition and enforcement and the great variety of effects that are attributed to partnerships in different legal systems creates legal uncertainty as to whether a partnership registered in one legal system will be recognised as valid in another legal system. To avoid uncertainty many couples have chosen to reregister their partnership anew in another jurisdiction when moving to that jurisdiction or when they have a special connection to that jurisdiction. Also, one couple may decide to register their partnership in several legal systems in an attempt to increase the rights and duties conferred on the partners. Several jurisdictions, for example Germany, allow partners that have already registered their partnership abroad to register anew.

249. Few jurisdictions have legislated regarding the matter of multiple registrations. Belgium is one of the few legal systems having expressly adopted a rule, which provides that a legal cohabitation relationship shall be governed by the law of the place of initial registration.[526] Germany has also provided for a rule in this area whereby only the law of the State of the latest registration applies to the effects of the partnership.[527] Accordingly, we have here an example of two neighbouring States that have expressly adopted inconsistent rules. Take, for example, a couple, one of whom is a Belgian national and the other German, who register their partnership in Belgium, where they

[521] Art. 7 ICCS Convention on the Recognition of Registered Partnerships.
[522] See in detail Art. 7 of the Convention.
[523] See above Part V, A.
[524] Arts 1 and 20 (1)a) ICCS Convention on the Recognition of Registered Partnerships.
[525] See Explanatory Report, *supra* footnote 520, Art. 2.
[526] Art. 60(1) Belgian PIL.
[527] Art. 17b) (3) German PIL

habitually reside, and then in Germany, where they are on holiday. Under Belgian law, only the law of the place of the first registration governs the formation and effect of the partnership, whereas in Germany, only the law of the partnership last registered governs the effects of the partnership. The validity of the registered partnership in Germany, however, is always governed by the *lex loci registrationis* of each partnership.

250. The ICCS Convention on the Recognition of Registered Partnerships also contains a rule in regard to multiple registrations. Article 6 of the Convention states that, when the same partners register their partnership in different States the effects on civil status mentioned in Articles 4 and 5[528] and prescribed by the law of one or several of those States shall be recognised even when the said effects are not known to all of the concerned States.

251. This is a third approach, differing from the approaches taken by Germany and Belgium in coverage and solution. First, the ICCS rule only applies to civil-status effects of registered partnership and secondly, the civil-status effects that the registered partnerships have according to the *lex loci registrationis*, are to be recognised cumulatively.

252. While this issue remains unresolved in several States for the time being, it has been argued that in addition to the possibility of providing for a specific rule dealing with the issue of multiple registrations of a single partnership, the adoption of rules with respect to the recognition of foreign partnerships would reduce the temptation of multiple registrations.[529]

[528] *Viz* as regards the extent to which a registered partnership may be an impediment to a partnership or marriage and effects regarding the surname.
[529] See on this issue, Ian Curry-Sumner, *supra* footnote 22, pp. 400 *et seq*.

PART VI – THE LEGAL QUAGMIRE – SOME EXAMPLES

253. The trend towards cohabitation outside marriage in many jurisdictions worldwide coupled with a rising birth rate outside wedlock has created a call for legal protection of such relationships. However, the decision to grant non-formalised cohabitation a legal status and attach to *de facto* cohabitation far-reaching legal consequences is a difficult one, since it may interfere with the autonomy of the cohabitants who may have chosen not to put their relationship on a legal footing by deciding not to marry. In view of the many cases of dependent relationships and the need for the protection of children, many jurisdictions have nonetheless decided to put in place at least a minimum legal framework of protection for those relationships. During recent years, some thirty jurisdictions have introduced registered partnerships in their legal system, often in addition to legislation on unmarried cohabitation.

254. The brief overview of the developments in national law in the field of unmarried cohabitation and registered partnership (see Part I and II) identified great differences between the relevant legal systems and a trend towards further divergence. In addition, there is considerable uncertainty as to the treatment of some of these phenomena in private international law. As set forth in Part IV, no legal system has enacted fully comprehensive private international law rules on unmarried cohabitation. Among the legal systems that have legislated on registered partnership, only some have also introduced specific private international law rules or provided for a *mutatis mutandis* application of existing conflict rules (see Part V).

255. On the whole, it can be stated that a trend towards the use of the *lex loci registrationis* or *lex loci celebrationis* as the law governing the formation, effects and dissolution of the partnership is visible.

256. Several jurisdictions still use the connecting factor of nationality, domicile or residence to determine the law applicable to, especially, the essential requirements of a partnership's formation and effects of the partnership, and, more rarely, to its dissolution.

257. Another interesting approach is the *lex fori* approach, which is used by certain common law jurisdictions in regard to the effects of a registered partnership. According to that approach a foreign registered partnership which is entitled to be recognised is considered to have exactly the same effects as the domestic registered partnership. This, however, leads to a similar result as a new registration of the partnership and emphasises the national concepts of registered partnership. Thus registered partners may have to face an extension or reduction of the effects of their partnership when moving from one country to another.

258. On the whole, it has to be emphasised that the divergent development of national and private international law in respect to registered partnerships creates great uncertainty for the partners concerned, when moving between different jurisdictions or when having a connection to more than one jurisdiction.

259. Some examples will illustrate:

<u>Example 1</u>

260. Natalie, a Belgian national, works and lives in the Netherlands where she meets Jan, a Dutch national, and concludes a registered partnership with him. After six years, Natalie leaves Jan and decides to return to Belgium. A year later, Natalie gets married in Belgium to Tom, a Belgian national. Some months later, Natalie receives an unpleasant letter from Jan, who is now unemployed, asking for maintenance.

261. This example illustrates the inconsistencies between the different legal systems in regard to the dissolution of registered partnerships. Under Belgian marriage law a registered partnership is not an impediment to a marriage.[530] This rule corresponds to the provision in Belgium law that a registered partnership ends automatically if one of the partners marries a third party. It does however lead to unsatisfactory results where the law of a foreign registered partnership in which the future Belgian spouse[531] is engaged, does not apply such a rule, as in the case of Dutch law. In the Netherlands a registered partnership can only be dissolved by a court ruling upon the application of one of the parties, or by joint declaration, signed by both parties and at least one lawyer or notary, and entry into the registry.[532] The result is that there is a valid marriage according to the Belgian law between Natalie and Tom while at the same time the registered partnership between Natalie and Jan is theoretically subsisting under Dutch and Belgian[533] law.

262. To prevent such a situation Article 4 of the ICCS Convention provides that a registered partnership should, "*to the extent that the law of the State of its registration so provides, […] constitute an impediment to the conclusion of a marriage or new registered partnership*".[534] The ICCS Convention on the Recognition of Registered Partnerships, which has not yet been signed by States, is the only international instrument that directly regulates certain aspects of registered partnerships. It is, however, only capable of covering a small part of the problems created through the inconsistency of the different legal systems in regard to registered partnership, since it is restricted to the civil status effects of the partnerships. Other effects of the partnership, such as effects regarding property rights are not within its scope.

Example 2

263. The following example illustrates problems that arise out of multiple registrations of partnerships in different countries.

264. Andrew, a UK national, and Jacque, a Belgian national, have registered a same-sex partnership in Belgium where they have been living together for several years. Not knowing whether their partnership would be recognised in Germany, where they have a holiday home and engage in certain economic activities, they also, to be on the safe side, register their partnership in Bonn (Germany)[535] during one of their quarterly trips. The following year, Jacque is hired as a translator in London, where the partners relocate. In the UK they ask for recognition of their Belgian registered partnership.

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[530] See also Ian Curry-Sumner, *All's well that ends registered?*, *supra* footnote 22, p. 42.

[531] According to Belgian private international law the capacity to marry is governed by the law of the State of the partners' nationality, see Art. 46 Belgian PIL. Therefore Natalie's capacity to marry is governed solely by Belgian internal law, where a registered partnership is no impediment to a marriage.

[532] Book 1, Arts 80 c(c), 80d and 80e Dutch Civil Code.

[533] According to Arts 60, 15 Belgian PIL the dissolution of a registered partnership (in the sense of this law) is governed by the internal law of the *lex loci registrationis*, which leads to Dutch law. According to Dutch law a registered partnership is not automatically dissolved by a marriage of one of the partners (which corresponds to the rule in Dutch law that a registered partnership is an impediment to marriage). According to Belgian law a marriage between Natalie and Tom is possible while the registered partnership between Natalie and Jan is subsisting under Dutch law. However, a Belgian judge, who would have to apply Dutch law to the question of validity of the registered partnership in our example case, could use the *ordre public* (Art. 21 Belgian PIL) to avoid inappropriate results. Still in practice the situation produces insecurity for all parties involved.

[534] See unofficial English translation available at < www.ciec1.org > (website last consulted in March 2008).

[535] The registration of a second partnership is possible in Germany since a foreign registered partnership between the same partners is no impediment to the registration of a German registered partnership. As stated above, no special link in terms of nationality or residence is needed to register a partnership in Germany. The recognition of the Belgian registered partnership in the UK is possible. The Belgian "statutory cohabitation" is one of the partnerships expressly mentioned in Schedule 20 of the UK Civil Partnership Act as being a recognisable "overseas relationship".

265. All jurisdictions involved have a different approach to multiple registrations. If Jacque splits up with Andrew and returns to Belgium, where a court then has to decide what effects their partnership has, the decisive partnership law would, according to the Belgian PIL,[536] be the one of the first registration, thus Belgian law. A German court, on the contrary, would determine the effects of the partnership in accordance with the law of the last registration.[537] Since the recognition of the Belgian partnership in the UK would quite probably not be considered a "new registration" (although having exactly the same effect as a new registration) the German court would regard the German registered partnership as being the latest. A German court would thus apply German law to the effects of the partnership. In the UK, a foreign registered partnership which is recognised deploys the same effects as a UK Civil Partnership. A court in England would thus apply the UK Civil Partnership Act to determine the effects of the partnership.

Example 3

266. Silvio, a Spanish national, and Tim, a Dutch national, enter into a same-sex marriage in the Netherlands and subsequently move to live in Hamburg, Germany. After two years, severe relationship problems arise and Tim wants to get divorced. He wonders how to proceed since their habitual residence is in Germany, where same-sex marriage does not exist. Tim thinks about filing for divorce in the Netherlands.

267. Although the Netherlands have introduced a special rule[538] of jurisdiction in regard to the dissolution of Dutch registered partnerships, securing the international jurisdiction of Dutch courts for their dissolution, no such rule was introduced regarding same-sex marriage. Since a same-sex marriage under Dutch law is to be treated like a different-sex marriage, the European Brussels II *bis* Regulation would be applied. Article 3 of the regulation provides no basis for international jurisdiction for the divorce of Tim and Silvio in the Netherlands.[539] This leaves Tim with uncertainty as to the dissolution of the marriage. Germany is likely to recognise a same-sex marriage as a same-sex registered partnership.[540] A German judge would then apply the private international law rule for registered partnerships (Art. 17b German PIL), which designates the *lex loci registrationis,* thus Dutch law, as law applicable to the dissolution. Problems would then arise as to whether the judge would apply the Dutch rules on dissolution of a same-sex registered partnership or those on dissolution of a (same-sex) marriage. But even in the latter case the decision would not be called a "divorce" and may thus not be recognisable in the Netherlands as such.

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[536] Art. 60 Belgian PIL refers in regard to the validity, effect and dissolution of a so-called "*relation de vie commune*" to the law of the first registration. However, according to Art. 58 Belgian PIL a "*relation de vie commune*" is defined as a registered relationship that does not constitute an equivalent to marriage. It is questionable how the Belgian PIL would deal with a situation as in the example. The German rules on same-sex registered partnership are in most regards modelled after the rules of marriage. It could therefore be that a Belgian judge would not apply Art. 60 Belgian PIL. This would create greater uncertainty. Would the Belgian registered partnership and the German registered partnership be considered as having parallel effects? Would, if the German registered partnership is considered an equivalent to marriage, the rule according to which a Belgian partnership ends as soon as one of the partners enters into a marriage be applied by analogy and the German partnership be considered the persisting one?

[537] Art. 17b (3) German PIL.

[538] See Art. 4(4) Dutch Procedural Code.

[539] See also Michael Bogdan's considerations of Dutch same-sex marriages in European Community Law, *supra* footnote 414, pp. 25, 30 *et seq*.

[540] See Peter Mankowski, *supra* footnote 409, Art. 13 EGBGB, notes 176 *et seq*.; see also Katharina Boele-Woelki, Ian Curry Sumner, Miranda Jansen and Wendy Schrama, "The Evaluation of Same-sex Marriages and Registered Partnerships in the Netherlands" in *Yearbook of Private International Law*, Volume 8 (2006), pp. 27, 30, 31.

268. In order to get divorced and avoid the uncertainty that an application to a German court would bring, Tim would have to move to the Netherlands.[541] After being habitually resident in the Netherlands for at least 6 months, he may then file for divorce in a Dutch court.

Example 4

269. The last example illustrates the uncertainty that exists where registered partners relocate or travel to a jurisdiction that does not provide for registered partnerships.

270. Isabelle and Pierre, both Belgian nationals, who have registered their partnership in Belgium, are in the course of fulfilling their dream of going to Moscow by car, when they get involved in a serious car accident in Minsk (Belarus). Pierre is badly injured and is immediately transported to the local hospital. Isabelle, who is only slightly injured, stays with the police for the formalities. When she arrives at the hospital she is denied access to Pierre and is not given any information about his state, since she is neither Pierre's wife nor a family member.

271. Belarus law neither provides for registered partnership nor a special protection of unmarried cohabitation.[542] The example illustrates problems that registered partners may have to face when travelling to a jurisdiction that grants legal protection to a relationship between two people only if they are married.

[541] If Tim can get Silvio's agreement to the dissolution of their partnership there is of course another possibility. If both partners to a same-sex marriage agree, they can have their marriage transformed into a Dutch registered partnership, and thus have access to the less demanding rules for the dissolution of their relationship as well as have access to Dutch courts even if they do not have their habitual residence in the Netherlands. However, where both partners are habitually resident abroad such a transformation is only possible if one of them is a Dutch national.

[542] See Lamara von Albertini, Bergmann / Ferid / Henrich, *Internationales Ehe-und Kindschaftsrecht*, Weißrussland, 157. Supplement, July 2004, pp. 26, 27.